

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF OKLAHOMA
3 STATE OF OKLAHOMA ex rel E. Scott)
4 Pruitt, in his official capacity)
5 as Attorney General,)
6)
7 Plaintiff,)
8)
9 VS.) NO. 11-CV-00030-RAW
10)
11 KATHLEEN SEBELIUS, in her official)
12 capacity as secretary of the United)
13 States Department of Health and)
14 Human Services; TIMOTHY GEITHNER,)
15 in his official capacity as)
16 Secretary of the United States)
17 Department of the Treasury,)
18 Defendants.)

19 * * *
20 TRANSCRIPT OF MOTION HEARING
21 DEFENDANT'S MOTION TO DISMISS
22 BEFORE THE HONORABLE RONALD A. WHITE
23 UNITED STATES DISTRICT JUDGE
24 JUNE 20, 2013
25 * * *

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United States Court Reporter

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COURT IN SESSION

(10:30 a.m.)

THE COURT: We are on the record in State of Oklahoma, el rel E. Scott Pruitt versus Kathleen Sebelius and Timothy Geithner.

Will counsel enter their appearances, please?

MR. WYRICK: Your Honor, Patrick Wyrick on behalf of the State of Oklahoma.

THE COURT: Thank you, Mr. Wyrick.

MR. PRUITT: Scott Pruitt, Attorney General for the State of Oklahoma, Your Honor.

THE COURT: Thank you, Mr. Pruitt.

MR. BATES: Tom Bates, First Assistant Attorney General.

THE COURT: Thank you.

MR. McELVAIN: Your Honor, Joel McElvain for the Defendants.

THE COURT: Thank you.

MS. BRANDON: Susan Brandon for the Defendants.

THE COURT: Thank you, Ms. Brandon.

All right. This matter comes on today on the Defendant's, the Government's Motion to Dismiss the Amended Complaint.

Before we get started, I have some preliminary matters. We have two government entities involved.

1 Typically it is only one and I say...what does the
2 Government think. I know we want a clear record, so
3 I am going to refer to the United States of America
4 as the Government and I am going to refer to the State
5 of Oklahoma as either the State or Oklahoma. If I do
6 that incorrectly, because we want a clear record, that
7 is when you may interrupt me and tell me that I have
8 denominated you incorrectly. That's the only time you
9 can interrupt me, by the way, but you can interrupt me
10 there.

11 We are here to have a hearing on the Affordable
12 Care Act or the ACA. I trust counsel will not refer
13 to the Act by the name that it has become known by
14 colloquially.

15 Now, I don't want either side telling me whether
16 the law is good or bad. That's not why we are here.
17 I noticed in the briefing that there was some of that.
18 I don't want to know whether the law is good or bad.
19 That's not why I am here. That's not what I am here
20 to decide. The purpose of this suit is to determine
21 whether the statute and the subsequent regulations pass
22 legal muster. And that's not what we are even for here
23 today. As you know, what we are here for today is to
24 discuss the issue of standing, whether the State of
25 Oklahoma has the standing to bring this suit at all.

1 Okay. Also, I don't know, Ms. Brandon, if you warned
2 them of this or not, you being local counsel, but
3 when I have a motion hearing like this, I typically
4 have both lawyers at the podiums. That way I can
5 bounce questions off of them at the same time and ask
6 what do you think of that, what do you think of that.
7 Okay? So I need one of you to take one podium and one
8 of you to take the other.

9 Mr. McElvain, you lost the flip of the coin I had
10 back in my chambers, so you get to be up front.

11 Mr. Wyrick, you can be at the back.

12 MR. MCELVAIN: I elect to receive, Your Honor.

13 THE COURT: What now?

14 MR. MCELVAIN: I elect to receive.

15 THE COURT: Okay, okay. All right.

16 Mr. Wyrick, I don't know if you had some argument
17 that you wanted to start out with or perhaps had some
18 revelation that you woke up in the middle of the night
19 with and thought, oh, this will really convince the
20 Court, but I want to start off just with a question.
21 Okay? In fact, probably this whole session will be
22 my questions.

23 The briefing and the talk of the ACA has probably
24 by necessity been somewhat esoteric and theoretical
25 because it is a complicated statute. I would like you

1 to, in a hypothetical, give me an example -- a
2 concrete example of how it is going to work after
3 January 1st, 2014. And with the facts of assuming you
4 lose this case, not that you are necessarily, but
5 assuming you lose this case and assuming I am an
6 employee of an Oklahoma Corporation -- let's call it
7 Pruitt Corporation -- Pruitt Corporation has more than
8 50 employees. I work 30 hours per week. What happens
9 after January 1st, 2014 to me and to Pruitt Corp? I
10 know there's going to be different branches, but give
11 it your best shot.

12 MR. WYRICK: Well, under the Affordable Care
13 Act, there are a couple of scenarios that could play
14 out. And, you know, there are some safe harbors that
15 have been built into some of the regulations, but I
16 am going to focus on sort of the usual case.

17 If that employee is, in fact, a permanent
18 employee working more than --

19 THE COURT: Let's call him employee Ron White.

20 MR. WYRICK: If Ron White is my employee and
21 he is a permanent employee working more than 30 hours
22 per week, I have to offer him insurance coverage that
23 satisfies the standards that are in the Affordable
24 Care Act.

25 THE COURT: What about the 30 hours per week?

1 Does the ACA change -- I mean, how did -- how did a
2 full-time employee used to be set? How did that -- what
3 was the definition of it?

4 MR. WYRICK: I think the federal law has
5 often used 30 hours. Under state law, we have always --
6 in terms of eligibility for health insurance benefits,
7 it has been a 999 hours per year threshold. So if you
8 work a 1000 hours or more under state law, you are
9 eligible for our health insurance.

10 THE COURT: Okay.

11 MR. WYRICK: Under the Affordable Care Act,
12 it is just 30 hours per week you are a permanent
13 employee, you are considered a full-time employee. As
14 an employer, I have to offer you insurance. If I
15 completely fail to offer you insurance, I can be
16 subject to the 26 USC 4980H(a) assessment.

17 THE COURT: Now, you are getting esoteric.
18 Okay?

19 MR. WYRICK: Right. Well, I'm breaking that
20 down because there are two different assessments that
21 they can make against that large employer. One is
22 the Subpart A assessment in that statute and one is
23 the Subpart B assessment.

24 The Subpart A assessment is one that they can make
25 if I completely fail to offer you insurance whatsoever.

1 If in that circumstance if the employee qualifies,
2 that is, they are in that 133 percent to 400 percent
3 of the poverty level income range, they are eligible
4 or potentially eligible for a credit or a subsidy
5 from the federal government that they can use to go
6 buy insurance through a health insurance exchange.

7 THE COURT: And how am I paid that?

8 MR. WYRICK: Well, there are two different
9 ways. In one instance, in the subsidy instance, the
10 federal government actually pays it directly to the
11 insurance provider. That's the subsidy where they
12 actually --

13 THE COURT: So they don't pay it to me?

14 MR. WYRICK: They forward it -- they -- I
15 don't think there is any circumstance in which the
16 money ever goes directly to your pocket. There is a
17 circumstance in which you get a tax credit at the end
18 of the year.

19 THE COURT: So that's indirectly/directly to
20 me?

21 MR. WYRICK: Yes, I think so. And that's a --
22 and in the circumstance where that happens, the health
23 insurance exchange can then certify that at least one
24 of your -- at least one of Pruitt Corp's employees,
25 Ron White in this instance, was not offered insurance

1 by Pruitt Corp and he received a credit from the
2 federal government.

3 In that instance the employer is then hit with a
4 penalty which is \$2,000.00 and they divide it by 12,
5 so you are penalized each month. \$2,000.00 divided by
6 12, so \$167.00 per month for every employee that I
7 employ minus the first 30. There is kind of this
8 safe harbor built in...well, we are not going to
9 penalize you for the first 30.

10 THE COURT: So even if I am the one who
11 qualifies Pruitt Corporation for that penalty, the first
12 30 aren't -- there is no assessment of the penalty for
13 them?

14 MR. WYRICK: That's right. But as the
15 employer, you are penalized for all of your employees
16 that you fail to offer coverage for. So if you have a
17 1000 employees, therefore you are hit with a penalty
18 for 970 employees.

19 Now, the second circumstance that can happen is the
20 Subpart B situation. That's when Pruitt Corp offers
21 insurance, but it doesn't meet the affordability
22 standard. That is, Ron White has to pay more than
23 9.5 of the premium cost. So under the federal
24 government's standard, it is not good enough insurance.
25 In that circumstance the employee is still eligible to

1 go to the federal government and receive the same
2 subsidy or credit to buy insurance from a health
3 insurance exchange. In that circumstance, however,
4 as the employer, I am hit with a \$3000.00 penalty for
5 that employee, but only for the employees who
6 actually have gone and the federal government has
7 paid some money to. So it is not nearly as punitive
8 as the Subpart A penalty where there is really on
9 proportionately between what the federal government
10 is paying out and what they are hitting the employer
11 with.

12 So those are the two scenarios and that's what
13 you are faced with as a large employer.

14 THE COURT: All right. Thank you.

15 Mr. McElvain, anything to add or to contradict
16 what Mr. Wyrick has said?

17 MR. McELVAIN: No, I think Mr. Wyrick's
18 summary is largely accurate. The one caveat that I
19 would note is his use of the phrase that the employer
20 has to offer the coverage. This is -- we are in the
21 realm of taxes. If they don't offer the coverage,
22 they are subject to a tax assessment. There is no
23 further requirement. This way it is quite analogous
24 to the (No. 10:39:59) coverage provision, which was
25 an issue in the Supreme Court last year where the

1 opinion for the Court said this is a tax, nothing else
2 happens to you. You either --

3 THE COURT: That's where we get into the tax
4 versus penalty conundrum.

5 MR. McELVAIN: Right. But the only point is,
6 is that -- I would just note that it is a misnomer to
7 say that anybody has to do anything. You are subject
8 to a tax if you don't. It is your lawful choice
9 whether you do or not.

10 THE COURT: All right. Okay. Mr. McElvain,
11 the government has filed a Motion to Dismiss. Now,
12 let's see if you can agree with me on these points:
13 Motions to Dismiss are not favored, correct?

14 MR. McELVAIN: I don't know if --

15 THE COURT: In general, Motions to Dismiss are
16 not favored. It is more favored to hear a case on the
17 merits.

18 MR. McELVAIN: I don't know if I agree with
19 that characterization, Your Honor. I think it is the
20 Plaintiff's burden to show that there is standing and
21 the Supreme Court has indicated over and over that you
22 need to be quite zealous to be sure that there is,
23 in fact, jurisdiction. So...

24 THE COURT: But in general, I think even in
25 more general terms, Motions to Dismiss are not favored.

1 MR. McELVAIN: If there are factual allegations
2 that support a claim and support a standing, then the
3 case should proceed forward.

4 THE COURT: So they are not in general favored
5 unless they are correct?

6 MR. McELVAIN: I'm sorry?

7 THE COURT: So they are not in general favored
8 or disfavored -- they are not in general favored unless
9 they are correct in the end?

10 MR. McELVAIN: Well, it is the Plaintiff's
11 burden to allege facts showing that there is standing --

12 THE COURT: Sure. But in doing that and
13 fulfilling their burden, the Court takes into account
14 that Motions to Dismiss are not favored in general in
15 the law.

16 MR. McELVAIN: I -- I -- yeah, I suppose
17 that that is right, but it is the Plaintiff's burden
18 and so they need to make an affirmative allegation.

19 THE COURT: I never thought that it would
20 take -- I thought that was an easy one to get you to
21 admit. And all you have to do is get -- in your
22 complaint is give a short and plain statement of the
23 case, yes?

24 MR. McELVAIN: Yes, subject to the Iqbal
25 standards that --

1 THE COURT: Twombly and Iqbal?

2 MR. McELVAIN: Twombly and Iqbal.

3 THE COURT: What is the standard there?

4 MR. McELVAIN: Is that you have to allege
5 sufficient facts to support a claim. And since we are
6 here on jurisdiction, sufficient facts to show that
7 there is, in fact, a claim for standing, that there is
8 some actual injury that you, yourself, incurred.

9 THE COURT: And you certainly agree, as
10 you've already said, that the Plaintiff has the burden
11 of proving jurisdiction --

12 MR. McELVAIN: Correct.

13 THE COURT: -- in the pleadings -- well, in
14 the pleadings?

15 MR. McELVAIN: Well, in the pleadings have
16 the burden of alleging facts that if later proven
17 would show their standing.

18 THE COURT: Okay. So that could be done -- if
19 it is uncertain, that could be done at a later time.
20 If there is uncertainty as to jurisdiction and
21 uncertainty as to whether the facts alleged are
22 sufficient, wouldn't the special solicitude given to
23 state governments militate in favor of denying the
24 motion to dismiss at the preliminary stages?

25 MR. McELVAIN: No, Your Honor, and I --

1 THE COURT: And I am not talking about this
2 specific case. I am talking about in general --

3 MR. McELVAIN: Yeah, yeah. I would refer
4 this Court to Wyoming versus Department of Interior,
5 the recent Tenth Circuit decision, which spoke about
6 the special solicitude language from the Supreme Court
7 in the Massachusetts case.

8 THE COURT: Isn't that the case that said,
9 boy, there's not much guidance for trial courts in
10 deciding this?

11 MR. McELVAIN: Correct, but they said the
12 one thing that we do know for sure is it does not
13 change the requirement of concrete injury and that a
14 state, like any other litigant, must show that there
15 is concrete injury.

16 THE COURT: Okay. Well, what does it mean --
17 what does the phrase in all of the case law mean when
18 they say "special solicitude?"

19 MR. McELVAIN: I, I would agree with the
20 Tenth Circuit's characterization that it is not entirely
21 clear what that -- what is meant. My understanding
22 would be that your obligation is to pay special close
23 attention to what the allegations are and --

24 THE COURT: Okay. You understand that I have
25 a special solicitude for thinking about what the Tenth

1 Circuit thinks.

2 MR. McELVAIN: Sure, yes.

3 THE COURT: Okay. And you said your under-
4 standing is it means this...well, where does your
5 understanding come from?

6 MR. McELVAIN: I, I -- again, with the Tenth
7 Circuit, I will -- I will agree with the Tenth
8 Circuit's characterization that it is not clear.
9 That's my best guess as to what that phrase means.
10 What the Tenth Circuit -- we don't need to go anywhere
11 further than what the Tenth Circuit said in Wyoming,
12 which was whatever else it means, it does not erase
13 the concrete injury requirement and that's why we are
14 here on a standing motion to dismiss today because the
15 concrete injury requirement is not met.

16 THE COURT: Okay. Now, there are three
17 Wyoming cases we will be discussing, as you know.

18 MR. McELVAIN: I'm sorry?

19 THE COURT: There will be three Wyoming cases
20 that we will probably be discussing, as you know.

21 MR. McELVAIN: Yes.

22 THE COURT: Wyoming seems to be in a lot of
23 the cases.

24 We have to take their statements in their
25 complaint -- Oklahoma's statements in their complaint

1 as true?

2 MR. McELVAIN: Yes.

3 THE COURT: Okay. Is that true across the
4 board? Let me stop you.

5 Mr. Wyrick, my statement, they have to be taken as
6 true, the allegations in your complaint. Is that
7 correct?

8 MR. WYRICK: So long as they are plausible,
9 yes.

10 THE COURT: Okay. So the plausibility
11 standard comes from Twombly.

12 All right. So you can allege that Oklahoma has
13 standing. If I have to take that as true, my job is
14 easy and I'm done. Is that right?

15 MR. WYRICK: We have to do a little more
16 than that and I think we have in the amended complaint.
17 We have to at least allege enough facts where the
18 Court can determine whether it is plausible as to
19 whether we have standing.

20 THE COURT: Okay. So it is facts you have
21 got to allege that I take as true?

22 MR. WYRICK: At least enough for the Court to
23 determine whether it is plausible that we will be able
24 to establish standing at the summary judgment stage.

25 THE COURT: Okay. Mr. Wyrick, in that line

1 of thinking -- I mean, in the cases which take the
2 Gestalt theory of finding standing, where is your -- I
3 mean, where is your best basis in those line of cases
4 to stand on?

5 MR. WYRICK: Which injury? Is that what you
6 are asking?

7 THE COURT: No, the -- where the cases taken
8 together form a Gestalt sort of idea of what standing
9 is.

10 MR. WYRICK: Well, I mean, I think Lujan says
11 it best. It is a concrete injury, in fact, that is
12 traceable and is going to be redressable by the relief
13 we seek. In terms of the injuries that we have alleged
14 here, our injuries kind of fall within two categories.
15 There is the injury to the state as a sovereign that
16 really falls within the Wyoming v. United States case,
17 the ATF case. And then there are the injuries that
18 the state has suffered as a large employer and those
19 are much more like what the Court normally sees --

20 THE COURT: Mr. McElvain, do you understand
21 what I mean?

22 MR. McELVAIN: I believe, sir --

23 THE COURT: You don't, do you?

24 MR. McELVAIN: I can take a stab at it.

25 THE COURT: Go ahead. That's all I did in

1 asking the question.

2 MR. McELVAIN: Okay. You know, again, the
3 Plaintiff needs to allege concrete -- a concrete
4 injury to show standing. And to take the two divisions
5 of their claim of standing that Mr. Wyrick identified,
6 the sovereign standing and the employer standing, the
7 claim of sovereign standing -- actually, I have to
8 subdivide this further because one part of their claim
9 is --

10 THE COURT: And that's my point. Okay?

11 MR. McELVAIN: Okay.

12 THE COURT: You are subdividing it into
13 different parts, right? I would be being inaccurate
14 if I said there is actually a line of cases that take
15 the Gestalt line of reasoning. I just made that up,
16 but basically there are different subdivisions of
17 this analysis, right? Gestalt means the hole is bigger
18 than the sum of its parts. It seems the courts -- not
19 that they ever say this, but it seems the courts use
20 that theory that...well, if you put all of the cases
21 together and look at all of the subdivisions, that
22 together those can create a standing. Does that make
23 sense?

24 MR. McELVAIN: I don't think that that is
25 what the case law holds, Your Honor. I think we need

1 to go through each claim of the State one by one and
2 decide if each claim alleges a concrete injury or not.
3 So I don't think there is any sort of hole that is
4 greater than the sum of its parts analysis that we
5 would --

6 THE COURT: You don't know of any case that
7 says that?

8 MR. McELVAIN: I think it is implicit in
9 various Supreme Court and Tenth Circuit cases which have
10 gone through with similar cases where a state has alleged
11 sovereign standing. They said, well --

12 THE COURT: So it is implicit?

13 MR. McELVAIN: Well, take the Wyoming versus
14 Department of Interior case --

15 THE COURT: No, I don't want to take that yet.
16 I am not ready to go there. I am just about ready to
17 go there, but not quite. Okay?

18 MR. McELVAIN: Okay.

19 THE COURT: Mr. Wyrick, how do you respond to
20 that? Like I said, there is no case that says Gestalt
21 reasoning, but would you disagree or agree that the
22 cases taken together seem to -- seem to line up in a
23 way that the issue of standing really is often decided
24 based upon the sum of the parts -- the sum of the parts
25 being less than the hole itself? Am I off base on that?

1 Because that is a -- that is a theory that is in your
2 favor, but I want to know if you disagree with it or if
3 you can legally in good faith agree that that is an
4 analysis that the Court should take.

5 MR. WYRICK: I think I can. I think that that
6 is a fair reading of the case law. I think we have
7 alleged an injury that would suffice under several of
8 the different lines, but the fact that we have
9 alleged a --

10 THE COURT: But can I take them together? If
11 one is sort of weak and one is a little stronger and
12 this one is weak and this one is really strong, can I
13 put them all together and find standing instead of doing
14 it individually on each subdivision as Mr. McElvain says?

15 MR. WYRICK: I don't think the Court needs to
16 do that here, but I think the Court can look at the sum
17 of the injuries and the harms that are caused to see
18 whether we have -- you know, if this is really sort of a
19 crystalized concrete injury. I would agree with that
20 statement.

21 THE COURT: That is interesting. I don't
22 know if you are right, but it is still interesting.

23 Okay. Mr. Wyrick, the Mellon case seems to be
24 cited by the -- both parties, maybe the government
25 more than Oklahoma, but nowhere in the briefing by

1 either side are there any facts relating to the Mellon
2 case. Can you give me the facts of the Mellon case?

3 MR. WYRICK: Oh, I'm trying to think. Is
4 Mellon --

5 THE COURT: Mellon, I think, is a bank.

6 MR. WYRICK: The bank. Yeah, that is the case
7 that was relied on or was the argument for the quasi-
8 sovereign parens patriae standing in Massachusetts v.
9 EPA? As I recall, they refer back to Mellon?

10 THE COURT: Well, the original Mellon case --
11 Mr. McElvain, can you give me the facts of the
12 Mellon case?

13 MR. McELVAIN: Massachusetts versus Mellon was
14 a suit by the Commonwealth of Massachusetts against,
15 I believe, the Secretary of the Treasury at the time.
16 Their claim was that their Tenth Amendment rights were
17 being violated because there was a program in existence
18 -- a federal program -- for payments to -- I would have
19 to go back to the case, but I think expectant mothers
20 are young children, something -- something along those
21 lines. And they claimed that that interfered with
22 their state sovereign right not to have such a
23 program. The Supreme Court held, "You cannot bring this
24 suit. It is a parens patriae suit. Any claims you are
25 bringing are really claims that your individual

1 citizens should be bringing."

2 So as to the suit between the State and the
3 federal government, that suit was dismissed.

4 THE COURT: Based upon the rejection of the
5 Tenth Amendment argument?

6 MR. McELVAIN: They did not reach the merits.
7 They said that the State was the wrong party to bring
8 the claim because the State cannot bring claims on
9 behalf of their citizens.

10 THE COURT: Who was the right party to bring
11 the claim in the Mellon case?

12 MR. McELVAIN: An individual citizen who was
13 harmed by what the federal government was doing.

14 THE COURT: Do you agree, Mr. Wyrick, that's
15 basically what the case says?

16 MR. WYRICK: It was a *parens patriae* case.
17 Of course, we do not rely on *parens patriae* standing
18 in this case. That's one misconception that the
19 government has in the briefings.

20 THE COURT: Do you -- you both say that each
21 other has misconceptions, but that's not -- I probably do
22 too.

23 Do you rely upon the Tenth Circuit -- not Tenth
24 Circuit -- the Tenth Amendment, Mr. Wyrick?

25 MR. WYRICK: You know, we do have the one

1 claim, the Garcia claim, that we have included.

2 THE COURT: Oh, we will get to that.

3 MR. WYRICK: Yes. It is Count 4 --

4 THE COURT: We will get to that at the end.

5 MR. WYRICK: Right. No, our other counts, our
6 counts that relate to the IRS rule directly, the APA
7 claim and the old -- and just the claim that it is
8 unauthorized by law do not rely on the Tenth Amendment.

9 THE COURT: Okay. So the -- I'll call it
10 the Garcia claim. I know that's not what it really is,
11 but it is at least partially based on the Tenth
12 Amendment?

13 MR. WYRICK: Yes. I mean, the idea there is
14 that Congress's commerce power doesn't go so far as to
15 allow them to impose these obligations on states.

16 THE COURT: Okay. In that regard, I take it
17 the State of Oklahoma does not see the Tenth Amendment
18 to the constitution as simply a tautology?

19 MR. WYRICK: Well, we are certainly
20 disappointed with the case law that has gone that route.
21 That's right.

22 THE COURT: It has been described that way.

23 MR. WYRICK: Right. We think it has some
24 meaning and, you know, the cases that came before
25 Garcia and those that have come after, Prince and

1 otherwise, I think, you know, suggested that -- in the
2 Bond versus United States case, just a couple of terms
3 ago, the Kennedy opinion suggested that there might be
4 more to the Tenth Amendment than the Court has given
5 credit for in previous years.

6 THE COURT: Okay. We are going to come back
7 to that. I sort of jumped ahead of my questions there,
8 but...okay.

9 Mr. Wyrick, what are the concrete facts showing
10 injury to the State of Oklahoma that you have pled in
11 your amended complaint, that you have pled?

12 MR. WYRICK: The first injury we have alleged
13 is the injury to the state as a sovereign. It is
14 really that Lujan -- Wyoming versus United States type
15 injury where Congress by statute has given someone a
16 right to do something and an agency has taken that away.
17 If we are right on the merits, and I think we --

18 THE COURT: Okay. Who is the someone?

19 MR. WYRICK: The someone -- the State of
20 Oklahoma in this case, yes.

21 THE COURT: Okay. So it is not just someone,
22 it is the State of Oklahoma.

23 MR. WYRICK: Right. The Affordable Care Act
24 -- Congress in the Affordable Care Act, you know,
25 described a system where it was the states who would

1 decide whether they would set up health exchanges or
2 they would elect to have the federal government do that.
3 And as a consequence of those actions, that would
4 determine whether certain tax credits were allowed
5 within the state --

6 THE COURT: I understand that, but my question
7 was -- and you partially answered it, but my question
8 was: What concrete facts showing injury have you pled
9 in your amended complaint? And you have said, first of
10 all, injury to sovereignty of the state of Oklahoma.

11 What else?

12 MR. WYRICK: That's the first injury --

13 THE COURT: Right.

14 MR. WYRICK: -- that the IRS rule took away.
15 We have also alleged that in our capacity as a large
16 employer we are subject to the 4980H assessments
17 because of this IRS rule.

18 THE COURT: Okay. So the State of Oklahoma
19 itself as an employer --

20 MR. WYRICK: As an employer.

21 THE COURT: Just like --

22 MR. WYRICK: Just like the Taco Bell
23 franchisee or even the --

24 THE COURT: Or the Pruitt Corp?

25 MR. WYRICK: Right, or Pruitt Corp, absolutely.

1 THE COURT: Okay. Sorry, Mr. Pruitt. I am
2 not picking on you. I am just -- you are the Plaintiff,
3 so I thought I would use you.

4 Okay. So sovereignty, Oklahoma as an employer,
5 a large employer. What else, what other concrete facts
6 of injury?

7 MR. WYRICK: I would like to expand on the
8 second for just a moment, if I may.

9 THE COURT: Sure, go ahead.

10 MR. WYRICK: It is -- the government has taken
11 a narrow view of being subject to that. It is not just
12 that we are now within the crosshairs of the regulation.
13 They seem to think that no one can be injured unless
14 they pull the trigger on the penalty and they penalize
15 us. We have also pled that it imposes, you know,
16 burdensome regulatory burdens on us that --

17 THE COURT: So I think it is planning,
18 compliance and --

19 MR. WYRICK: Planning, compliance, record
20 keeping and also the fact that at least in a couple
21 of respects it appears that our benefits plan does not
22 comply with the new federal requirements.

23 THE COURT: Planning, compliance and record
24 keeping. Is that sufficient concrete evidence of
25 injury to get past a motion to dismiss? I mean, don't

1 you have to plead more than that? I mean, I can't
2 take as true conclusory allegations in the amended
3 complaint. I mean, everyone has to do planning,
4 compliance and record keeping with regard to their
5 taxes. They can't sue on those grounds, can they,
6 even an individual? They can't pay the tax and sue
7 because, gosh, I was injured because I had to have
8 planning, compliance and record keeping and, therefore,
9 give me a refund?

10 MR. WYRICK: But that would be the type of
11 generalized injury that every taxpayer in the United
12 States suffers as a result of a regulation. That
13 doesn't particularize it enough. But the courts and
14 in the case law, when you are the type of entity that
15 is directly within the crosshairs of a regulation --
16 you know, record keeping and reporting requirements
17 are often found to satisfy injury, in fact. I mean,
18 look at the abortion cases. Planned Parenthood --

19 THE COURT: Oh, let's not look at those.
20 Let's look at --

21 MR. WYRICK: Planned Parenthood versus Casey
22 -- I mean, the abortion clinics rely on the fact that
23 those statutes caused them to have to report to the
24 state. That was their injury as a clinic and why
25 they had standing to sue.

1 We have an injury here whether there is a new
2 statute --

3 THE COURT: Did you cite any of those cases,
4 did you cite Casey?

5 MR. WYRICK: I don't think we cited Casey in
6 the briefing.

7 THE COURT: That's okay. Mr. McElvain, are
8 you saying that compliance, planning and record keeping
9 are insufficient? Because those were pled.

10 MR. McELVAIN: Well, they weren't pled
11 actually. If you go back to the complaint, there is
12 none of this in the complaint. It was argued in the
13 opposition to the Motion to Dismiss.

14 THE COURT: Talking about what isn't in the
15 complaint, the link to the State of Oklahoma's plan --
16 medical plan for benefits, it is not in the complaint
17 either --

18 MR. McELVAIN: Correct.

19 THE COURT: And you cited that.

20 MR. McELVAIN: Right, but it is their burden
21 to allege facts. The only reason we cited the plan is
22 to make a further point that --

23 THE COURT: But I can't go outside the
24 complaining in deciding a Motion to Dismiss.

25 MR. McELVAIN: All that you need to do to

1 decide the Motion to Dismiss is to show -- is to say that
2 they have pled absolutely nothing about whether they
3 will be subject to 4980H or not.

4 THE COURT: Okay. Then whether they pled or
5 didn't plead those factual statements about the Oklahoma
6 -- about the State of Oklahoma health benefit plan, your
7 citation to some web link that says, oh, it looks like
8 they won't be hurt, that is outside the complaint and
9 I can't really rely on that, can I?

10 MR. McELVAIN: Correct. All you need to do
11 is look back at the complaint and see if there is --

12 THE COURT: All I can do, all I can do.

13 MR. McELVAIN: Correct, correct.

14 THE COURT: Okay. Thank you.

15 MR. McELVAIN: Your Honor?

16 THE COURT: Yes. I'm sorry.

17 MR. McELVAIN: May I return to your question
18 about the Gestalt theory?

19 THE COURT: Oh, I would love to, sure.

20 MR. McELVAIN: The thought that did not occur
21 to me at the time, but has occurred to me now is that,
22 in fact, this has actually been directly addressed by
23 the Supreme Court. In cases like Lewis versus Casey
24 and DaimlerChrysler Corporation versus Cuno, and I
25 can provide the citations to you.

1 THE COURT: They were -- I know that
2 DaimlerChrysler was cited.

3 MR. McELVAIN: It was, yes, sir.

4 THE COURT: So I've got that one.

5 MR. McELVAIN: The Supreme Court was careful
6 to note that standing is not dispensed in gross.
7 So Plaintiff must show a standing individually for each
8 claim and for each form of relief sought on each claim.
9 So the Supreme Court has been very careful to note
10 that, in fact, you do go one by one and see if each
11 individual claim can survive or not.

12 THE COURT: Good for you. Mr. Wyrick?

13 MR. WYRICK: Well, I didn't understand that to
14 be the Court's point. I mean, certainly each Plaintiff
15 has to allege facts sufficient to satisfy standing as
16 to each claim. That's not the issue. I thought the
17 Court's point was whether, you know, in the aggregate
18 the harms that have occurred to the State -- you know,
19 if each individually might not satisfy across the
20 line, if together they do, I think absolutely.

21 THE COURT: Well, that was my point.

22 MR. WYRICK: I think their -- the Daimler-
23 Chrysler case doesn't stand for the proposition that
24 you can't do that.

25 THE COURT: What does it stand for?

1 MR. WYRICK: It stands -- I think what he said
2 is correct, that each Plaintiff has to allege facts
3 sufficient to allege injury as to each claim, which is
4 really a noncontroversial proposition.

5 THE COURT: Well, we will see if it is
6 noncontroversial or not.

7 Okay. Mr. Wyrick, how do you get around the
8 Wyoming versus U.S. Department of Interior case? I
9 mean, it is sort of tough, isn't it?

10 MR. WYRICK: I don't think so. I mean, I
11 think if you look at the Wyoming -- I want to go back
12 to Wyoming versus United States for just a minute
13 because I think it is on all fours with this case.

14 THE COURT: Is that the Department of
15 Interior --

16 MR. WYRICK: That's the ATF case.

17 THE COURT: Okay. Well, no, I don't want to
18 go back to that. I want to stay with the one under
19 which you lose and you tell me how you get around it.

20 MR. WYRICK: Well, because here what we have
21 alleged is not the type of injury that has occurred to
22 the State -- I mean, in Wyoming it was the trade-off
23 of the coal rights on the ranch in exchange for an
24 easement, right? What we have alleged here is that
25 we actually have a congressionally granted statutory

1 right. There what they were -- what Wyoming was
2 complaining about was that there was perhaps this
3 right that they might have or someone might have to
4 object to that trade that the federal government was
5 making. And they said, well, you haven't shown that
6 you are injured by that trade that anyone is making,
7 nor have you shown, you know, that you as a state have
8 been granted the right to object to that. In the
9 Wyoming versus United States case, however, the Court
10 said --

11 THE COURT: Let me stop you. I'm sorry.

12 Mr. McElvain, how do you get around Wyoming versus
13 United States -- well, el rel Crank -- no, Wyoming,
14 el rel Crank versus United States, which is the ATF
15 case.

16 MR. McELVAIN: The ATF case. In that case the
17 Tenth Circuit held that Wyoming had standing because
18 the actions of the ATF implicated Wyoming's power to
19 create and enforce a legal code and the "...and enforce
20 language" is what is key. If the State of Oklahoma
21 starting with the challenge to the, you know, coverage
22 provision. If the State of Oklahoma were actually
23 doing something having to do with individuals -- if
24 there was some way that that provision were actually
25 regulating Wyoming as a state, then, of course, they

1 would have standing, but the problem there is that
2 it is not. That provision applies to individuals. It
3 does not apply to a state in any way. So Wyoming is
4 simply attempting to interpose itself in a dispute --
5 a potential dispute between the individual residents
6 and the federal government. The fact that there was
7 a state constitutional amendment does not change the
8 analysis because, again, remember, the language is
9 create and enforce a legal code.

10 THE COURT: And we will get to that in a
11 little bit too, but I understand what you are saying.
12 I understand that is sort of a weak link in your chain.
13 You probably won't admit that, will you?

14 MR. McELVAIN: I am sorry, what's a weak link?

15 THE COURT: That case, Wyoming versus U.S.
16 Department of Interior. That is sort of a weak link
17 in your chain?

18 MR. McELVAIN: Wyoming versus Department of
19 Interior is the case about the snowmobiles?

20 THE COURT: No. I'm sorry. The case about
21 the coal land swap.

22 MR. McELVAIN: I'm sorry, the ATF case? Is
23 that the --

24 THE COURT: Yes. I am sorry, sir, yes, yes.

25 MR. McELVAIN: Okay. So Wyoming versus

1 United States, the ATF case -- and there are a lot of
2 Wyoming cases. So it can get very confusing.

3 Again, the relevant language is "create and enforce
4 a legal code." This is specifically discussed by the
5 Virginia versus Sebelius case, which said, "We don't
6 have to go into conflict with the Tenth Circuit. We
7 are well onboard with the way the Tenth Circuit analyzed
8 that case. The Virginia case was entirely different
9 because we are only talking about a state declaratory
10 statute. The state enacts something declaring its
11 opposition to what is popularly known as the individual
12 mandate and -- and that is fine, they can declare their
13 policy views, but it doesn't effect at all the way the
14 relationship would be between an individual and the
15 federal government in any potential lawsuit between
16 those parties. So Virginia didn't have standing in
17 that case and Oklahoma stands in the same posture here.

18 THE COURT: Well, this paragraph cited by
19 Oklahoma from the Wyoming versus -- let's call it the
20 Wyoming versus ATF case, just to keep them straight
21 and so I won't be confused, as you said.

22 "The Act, however, also grants States significant
23 latitude to determine the applicability of the Act by
24 relying on state law in part to determine the classes
25 of individuals that may not possess a firearm.

1 Therefore, in light of the State's interest in
2 influencing" -- not enforcing -- "influencing the
3 applicability of the Act, we conclude that Wyoming's
4 alleged injury falls within the zone of interest of
5 the Act," meaning they have standing.

6 Okay. So it doesn't say enforcing, it says
7 influencing.

8 MR. McELVAIN: Right, but -- I'm sorry.
9 I didn't mean to interrupt you.

10 THE COURT: No, no, you are fine.

11 MR. McELVAIN: But the bottom line though is
12 that the reason that it mattered for Wyoming is that
13 they had their own state expunction statute, if that's
14 the correct pronunciation.

15 THE COURT: Expunction?

16 MR. McELVAIN: Expunction is the term that was
17 used in the case. It is not a term I had ever heard
18 before. Expungement is the term I would use.

19 THE COURT: Expunction?

20 MR. McELVAIN: Yes. Anyway, they had their
21 own state statute which would have been enforced and
22 implemented one way if they had won the case and
23 enforced and implemented a different way if they had
24 lost the case. ATF had come to Wyoming and said you
25 must change this statute or else we are going to be

1 enforcing concealed carry against all Wyoming
2 residents. So there was a direct and immediate threat,
3 if you want to use the term threat, to how Wyoming
4 conducted its own regulatory activities. That's not
5 what we have here, either in the challenge to the
6 minimum coverage provision or in the challenge to the
7 employer tax.

8 THE COURT: Which is the IRS rule?

9 MR. McELVAIN: The IRS rule, yes.

10 THE COURT: Okay. The parens patriae theory,
11 I think you cited it for the proposition that the
12 United States is presumed to represent the citizens of
13 a state, I guess, even more so or collaterally with
14 the state itself. I mean, is that a fair reading of
15 what you cited the case for?

16 MR. McELVAIN: As between the state and the
17 federal government, yes, that's one of the underlying --

18 THE COURT: The government wins as far as
19 representation of the citizens?

20 MR. McELVAIN: As far as jurisdiction in
21 federal court goes, yes.

22 THE COURT: Okay. Exceptions to that? None?

23 MR. McELVAIN: None. Again, if a state
24 shows its own actually activities are harmed, the State
25 may have standing to sue on its own behalf, but it --

1 THE COURT: In which case it just wouldn't
2 be parens patriae?

3 MR. McELVAIN: Correct.

4 THE COURT: Okay. Mr. Wyrick?

5 MR. WYRICK: It seems as though Massachusetts
6 versus EPA with its talk about --

7 THE COURT: What was that?

8 MR. WYRICK: Massachusetts versus EPA with
9 its talk about quasi sovereign interest recognized
10 that there might at least be some class of what you
11 might think of as a parens patriae type claim where
12 the State also has an interest in the outcome, that
13 quasi sovereign interest, but here you are right,
14 we directly -- the injuries we are relying upon are
15 injuries to the State of Oklahoma, not the injuries
16 to any of our citizens.

17 THE COURT: Okay. Back to Wyoming versus
18 ATF, was it correctly decided?

19 MR. McELVAIN: I'm sorry?

20 THE COURT: Was it correctly decided?

21 MR. McELVAIN: I think that there may be
22 reason to question whether it was, but obviously it's
23 Tenth Circuit authority, so we are not going to be
24 doing that questioning here today.

25 THE COURT: I understand. Judge, you know,

1 as a lawyer can you find -- and I don't want to reach
2 into the depths of your heart and make you expose it
3 to the public, but I just wondered if you thought it
4 was correctly decided. I have been -- I was asked
5 that about certain cases when I practiced law and I
6 hate it, but I figure it gives me leave to do it to you.

7 MR. McELVAIN: If I can plead agnosticism
8 on the point, I will.

9 THE COURT: All right.

10 MR. McELVAIN: We can assume that it was
11 rightly decided because all it said was there is a
12 case where Wyoming's own regulatory activities are
13 being impacted and --

14 THE COURT: And, in fact, the Department of
15 Interior case, Wyoming versus Department of Interior,
16 it was subsequent to the ATF case, right?

17 MR. McELVAIN: Yes.

18 THE COURT: Its reason flowed from the ATF
19 case.

20 MR. McELVAIN: Yes, I think that's fair.

21 THE COURT: Okay.

22 (PAUSE)

23 THE COURT: You see, you made me go out of
24 order and I've already crossed off things that we've
25 already covered.

1 Okay, Mr. McElvain. I hope you don't think I am
2 picking on you. I made you stand up front and I am
3 asking you more questions.

4 MR. McELVAIN: That's fine.

5 THE COURT: Okay. After January 14th, would
6 the State of Oklahoma have standing? I mean, you cited
7 a case, South Carolina versus Katzenbach, which I believe
8 went to that issue. It is almost more of a rightness
9 issue more than a standing issue, but you cited it for
10 that reason why, certainly before January 1st, 2014,
11 the State of Oklahoma doesn't have standing.

12 MR. McELVAIN: Right. That's an additional
13 problem they have under the South Carolina versus
14 Katzenbach reasoning, but even after January of 2014
15 they don't have standing because, again, it goes to
16 the -- what they claim their injuries are. The
17 sovereign interest that they are claiming is a belief
18 that the State economy will be harmed. Now, obviously
19 we vigorously dispute. We think that the economy will
20 be helped, but it doesn't --

21 THE COURT: A policy difference between the
22 State of Oklahoma and the federal government doesn't
23 confer standing?

24 MR. McELVAIN: Correct.

25 THE COURT: But a legal difference in the

1 effect of the statute would?

2 MR. McELVAIN: That actually affects Oklahoma's
3 own activities would impart standing, yes.

4 THE COURT: Okay. So aren't we getting the
5 cart before the horse? Aren't we deciding the merits
6 in order to decide standing? How do we know without
7 getting to the merits that this is simply a policy
8 disagreement or this is a difference in the legal
9 effect of the law?

10 MR. McELVAIN: No, we don't need to get into
11 the merits. And again, to be clear, we do vigorously
12 dispute the merits. We believe the rule was properly
13 promulgated. We believe Oklahoma is only looking at
14 one half of the relevant statutes. But you can even
15 assume that they are right and they are still not
16 alleging any injury that they themselves suffer as
17 opposed to an injury that perhaps an employer within
18 Oklahoma might suffer.

19 THE COURT: Wouldn't that be really more -- I
20 know you dispute my statement, which I think is
21 Blackletter Law. We can dispute that ourselves, but
22 wouldn't that be something more appropriately decided
23 on the merits because I can throw out a case for lack
24 of jurisdiction anytime, right?

25 MR. McELVAIN: True, but we do have to get

1 passed the Motion to Dismiss stage and establish
2 whether they have alleged a concrete injury.

3 THE COURT: Mr. Wyrick, under Twombly your
4 assessment is that all Oklahoma has to do is show --

5 MR. WYRICK: -- enough to convince the Court
6 that our claims are plausible. We will plausibly be
7 able to meet our standard --

8 THE COURT: Okay. And there is nothing here
9 plausible, Mr. McElvain?

10 MR. McELVAIN: Correct. Because when you look
11 at the individual -- types of individual injuries they
12 are claiming, the sovereign injury as a matter of law
13 is not an injury that they can sue on. The injury to
14 their -- in their status as an employer, there is
15 simply nothing pled in the complaint at all. They
16 don't allege at all whether they are going to incur
17 the assessment and manage to get into the benefits
18 plan, speculation about temporary employees or
19 what have you, which we think they are also wrong on --

20 THE COURT: But that is also something
21 outside of --

22 MR. McELVAIN: It is also something way
23 outside of the pleading, so we are not even getting
24 to that point yet, correct.

25 THE COURT: Okay. Mr. Wyrick?

1 MR. WYRICK: Well, first, I want to dispute
2 the sovereign injury that he described, the damage to
3 the economy. The sovereign injury that we have alleged
4 upfront is that we had a choice -- Congress gave us
5 the choice. It was ours to make as the State of
6 Oklahoma.

7 THE COURT: A right given to Oklahoma by the
8 federal statute?

9 MR. WYRICK: By statute and they took that
10 away.

11 THE COURT: Let me interrupt. How does that
12 interplay with the right given by the ACA to Oklahoma
13 -- interplay with the amendment to the constitution
14 of Oklahoma giving Oklahomans the right not to be
15 included in any healthcare system? Is there a
16 Gestalt issue there?

17 MR. WYRICK: I'm keeping those two separate.
18 I'm keeping Count 1 separate --

19 THE COURT: Okay. Is that what I should do?

20 MR. WYRICK: I think so.

21 THE COURT: Okay. That's why we are here,
22 is because the Court needs guidance and education.
23 So I want to hear what the parties have to --

24 MR. WYRICK: Wyoming versus United States
25 speaks both to Count 1 and the rest of our counts.

1 I think it is on all fours with the rest of the counts,
2 but, yeah, I think in terms of the injury that we have
3 alleged there is a difference. The large employer
4 mandate injury is -- Congress absolutely gave the
5 State this choice and the IRS took that away.

6 THE COURT: Or in your view took it away.

7 MR. WYRICK: If we are right on the merits,
8 took it away.

9 THE COURT: And if they are right on the
10 merits, the IRS took it away legally.

11 MR. McELVAIN: I believe --

12 THE COURT: I'm sorry. If they are right on
13 the merits, the IRS took away a legal right of the State
14 of Oklahoma and it is not just a policy difference?

15 MR. McELVAIN: No. It is still a policy
16 difference and here is why: The Supreme Court has said
17 in Lujan versus Defenders of Wildlife that even in a
18 case where Congress grants a statutory right -- and
19 obviously we dispute that there has been any such grant
20 here, but even leaving that aside --

21 THE COURT: I'm sorry. I hate to interrupt.
22 The ACA didn't grant a statutory right to the State of
23 Oklahoma?

24 MR. McELVAIN: Well, let's be precise.

25 THE COURT: Please.

1 MR. McELVAIN: They do have the right to
2 decide not to set up their own exchange. That's
3 undisputed. They have that right.

4 THE COURT: Okay. So they have the right --

5 MR. McELVAIN: That is not an issue.

6 THE COURT: So they have a right under the ACA?

7 MR. McELVAIN: Correct.

8 THE COURT: That's all I wanted to know. Thank
9 you.

10 MR. McELVAIN: Right.

11 THE COURT: Okay. In that regard -- y'all
12 are really doing a great job of following along with my
13 notes that I thought were totally disorganized. I
14 appreciate that. I don't know how you -- have you
15 read these?

16 MR. McELVAIN: I wish, Your Honor.

17 THE COURT: Okay. So Oklahoma exercised its
18 choice given it statutorily by the United States
19 Government under the ACA with the understanding that
20 certain effects flood from that based upon if they are
21 right on the merits, the Blackletter of the law.

22 Okay. How is that not commandeering state
23 government implementation of policy when the effects of
24 the State of Oklahoma's interpretation of a law given
25 to them statutorily by the federal government are such

1 that they can determine what premium credits and what
2 -- well, let's call them what premium credits and what
3 penalties can be -- or taxes can be assessed by making
4 that choice? Isn't that a choice I have to make on the
5 merits?

6 MR. McELVAIN: No, because the commandeering
7 cases go to requirements actually imposed on the state
8 itself. So in New York versus United States, New York
9 was required to take the radioactive waste or Oregon
10 versus Mitchell, where Oregon was required to setup
11 its voter registration forms in some way. That's
12 pretty far-field from saying that how the federal
13 government implements its own federal tax credit
14 program has anything to do with what a state government
15 is actually itself doing.

16 THE COURT: But if Oklahoma is right on the
17 merits, the ACA gave them the right to do that.

18 MR. McELVAIN: If -- assuming that that is
19 right and that there has been that statutory right
20 granted -- and, of course, we dispute that -- but even
21 assuming that is right, the Supreme Court has said over
22 and over again, most notably in Lujan versus Defenders
23 of Wildlife, that even Congress granting a statutory
24 right does not erase the concrete injury requirement.
25 You still have to show that some violation of the

1 statutory right affects a concrete interest of yours
2 in order to have standing. And that's the problem
3 here, is that Oklahoma does not have that concrete
4 injury here.

5 THE COURT: Have you given me -- sorry.
6 Have you given me the facts of the Lujan case yet?

7 MR. McELVAIN: I am afraid I am not well-
8 versed, but I'm -- I am -- it was an environmental
9 case, but the claim was --

10 THE COURT: But you are --

11 MR. McELVAIN: -- that they had a statutory
12 right --

13 THE COURT: But you are relying upon it and --
14 well, okay.

15 MR. McELVAIN: I apologize.

16 THE COURT: No, no, no. I mean, I am just
17 asking. It was excellent briefing in the case. My only
18 criticism is that you cited a lot of different law --
19 well, both sides did -- a lot of different law for --
20 and a lot of cases for discrete points of law, but you
21 don't give me the facts for me to -- for the Court to
22 determine whether or how that applies to this case.
23 That's why I am asking a lot for the facts of the
24 cases. I am not trying to put you on the spot. I am
25 just trying to figure out how it applies to where we

1 are now.

2 Mr. Wyrick, the facts of the Lujan case, please.

3 MR. WYRICK: Yeah. In that case the federal
4 government changed a regulation where they no longer had
5 to do sort of like an environmental assessment of some
6 sort for actions that they took in federal countries or
7 on federal lands in foreign counties. They scaled that
8 back to only federal lands in the United States or on
9 the high seas. So the Plaintiffs, this environmental
10 group, alleged...well, we travel to Africa and other
11 places and visit some of these lands and we are injured
12 by your failure to do environmental assessments when
13 you take some significant federal action on those lands.

14 THE COURT: So what was the result of the
15 Lujan case?

16 MR. WYRICK: They found that those plaintiffs
17 did not have standing because they had failed to allege
18 that they had any imminent plans to visit any of those
19 foreign lands that they claimed should be subject to
20 the regulation.

21 THE COURT: But they changed -- is it the
22 same scenario as here that -- at least Oklahoma is
23 alleging -- that the federal government gave us a
24 statutory right and through regulation is taking it away?
25 Is that -- is that analogous or not?

1 MR. WYRICK: It is a little different because
2 those plaintiffs weren't who had the right to conduct
3 an environment assessment. It was an obligation imposed
4 on the federal government itself by federal statute to
5 conduct an environmental assessment or -- I don't know
6 if it was actually an environmental impact statement at
7 issue, but whatever environmental assessment the
8 regulations required and they just alleged that they
9 would be sort of, you know, tangentially harmed by the
10 failure to do that because it would have an impact on
11 the wildlife that they wanted to go see if the government
12 failed to do that. Whereas here, we have a statute that
13 directly regulates the State of Oklahoma and gave the
14 State of Oklahoma the choice and then they took that
15 away.

16 THE COURT: Without getting into the last part
17 of his argument about how it applies to the State of
18 Oklahoma, did you agree Mr. McElvain with his description
19 and interpretation of the Lujan case?

20 MR. McELVAIN: Yes, but the --

21 THE COURT: Okay. You just disagree on the
22 result xx(11:19.58)

23 MR. McELVAIN: Yes.

24 THE COURT: Okay. Thank you. So we agree that
25 the ACA gives -- bestows upon the State of Oklahoma at

1 least one statutory right and the government's position
2 is that...well, they exercised that right to choose not
3 to create an exchange, so we are going to, which I agree
4 is perfectly acceptable under the statute, but Oklahoma
5 says...well, by exercising that right the statute gives
6 us other rights, which is to prevent these credits and
7 these penalties. The government is saying, no, the
8 State decision is exactly what the federal government's
9 decision is. Let's assume that's right. I know you
10 probably disagree with it. In that case the choice is
11 meaningless. The statutory right -- the choice given to
12 Oklahoma is meaningless.

13 MR. McELVAIN: No, it means quite a bit, Your
14 Honor. The State either --

15 THE COURT: So tell me what it means.

16 MR. McELVAIN: Well, the State can decide
17 whether or not it wants to setup its own exchange,
18 and some states decide it is better because if you do
19 set-up the exchange you retain a certain amount of
20 regulatory authority over insurance plans within that
21 exchange, which you are surrendering to the federal
22 government if you decide not to do that. There are
23 individual -- you know, it gets fairly (inaudible),
24 but individual regulations of participating insurers
25 would either be run by the federal exchange or by the

1 state operated exchange. So that's one side of it.

2 The other side of it, of course, is there is some burden
3 of time and resources and manpower in setting up the
4 exchange.

5 THE COURT: Which is one of their concrete
6 allegations of damage.

7 MR. McELVAIN: No, because they are not doing
8 the exchange. They have already decided not to do it.
9 So that's the lawful choice and they can do that.
10 That's fine, that's the choice that was given to them
11 by the Affordable Care Act.

12 The further claim that they have the right to
13 decide whether the federal government gives federal tax
14 credits to several hundred thousand of its residents
15 does not state a claim of concrete injury because at
16 that point you are just left with the assertion that
17 we disagree with the federal government's application of
18 federal law.

19 In the Wyoming versus Lujan case, they had the
20 exact on this. "A generalized grievance that the
21 government is not acting in a way -- the federal
22 government -- the federal government is not acting in
23 a way in which the State maintains is in accordance with
24 federal law is insufficient to demonstrate standing."
25 That's 969 F2d 877 at 883. I think that's dispositive

1 of this case.

2 THE COURT: Lujan?

3 MR. McELVAIN: Wyoming versus Lujan, yes.

4 THE COURT: Okay. So that's your primary
5 focus on prevailing, on standing, is Wyoming versus
6 Lujan? And I am not -- I am not trying to pin you
7 down, but --

8 MR. McELVAIN: Well, I --

9 THE COURT: But you just said this case turns
10 on -- this case turns on Wyoming versus Lujan. Did I
11 hear you say that correctly?

12 MR. McELVAIN: I think the -- well, I am not
13 sure how to --

14 THE COURT: Is that overbroad? Did you mean
15 -- were you a little overbroad?

16 MR. McELVAIN: I think I am broader than that.
17 The bottom line is, they have to show a concrete injury.
18 Their claims of a sovereign injury have been held
19 repeatedly and cases like that that does not rise to
20 the level of a concrete injury.

21 THE COURT: Mr. Wyrick, I don't mean to throw
22 you a softball. It is not really fair to our guests
23 here, but here's a softball: What's your response to
24 that?

25 MR. WYRICK: This is far from a generalized

1 grievance. I mean, we are talking about something
2 specifically granted to the states in which -- and, you
3 know, as Your Honor noted from the briefing, it is a
4 decision of huge policy import to these sovereign
5 states.

6 THE COURT: If it's just a difference in
7 policy interpretation, there's no standing.

8 MR. WYRICK: It is not a difference in policy
9 interpretation. It is that Congress gave the states
10 the right to make the choice of what policy would be in
11 place in its state and that's where it is on all fours
12 with Wyoming versus United States. Just like Wyoming
13 had an interest in determining the applicability of
14 federal law in that case, the State of Oklahoma has an
15 interest in determining the applicability of this law
16 in our state.

17 THE COURT: Okay. Mr. McElvain, suppose --
18 this is a hypothetical. Okay? Suppose the federal
19 government came in and said we are going to pay all of
20 the expenditures of the State of Oklahoma, all of them.
21 All of the -- everyone who gets benefits in the State
22 of Oklahoma, we are going to pay. We are going to pay
23 for the Department of Corrections, we are going to pay
24 for the roads and the bridges, but, of course, we are
25 going to do it the way we want to. Now, that would be

1 commandeering of state sovereignty, wouldn't it?

2 MR. McELVAIN: I think you would have to look
3 to the language and the Supreme Court's opinion from
4 last year, NFIB, as to what amounts to a compelled
5 choice.

6 THE COURT: I am sorry, I don't mean to
7 express disbelief, but are you really saying that
8 wouldn't be just prima facie commandeering of state
9 sovereignty?

10 MR. McELVAIN: I am suggesting it is highly,
11 highly unlikely that that would ever happen --

12 THE COURT: That's not what I am asking. I
13 said it was a hypothetical.

14 MR. McELVAIN: And -- well, I am sorry if I
15 have -- let me be sure I understand your hypothetical.
16 The federal government is coming in and saying you have
17 the choice Oklahoma that we will pay for everything or
18 they just are saying they are going to do that?

19 THE COURT: We are just going to do it.

20 MR. McELVAIN: Oh, well, yeah, I think that
21 probably would constitute commandeering.

22 THE COURT: Because that's what the IRS rule
23 does too, isn't it? I mean, just on a different
24 scale. I used the hypothetical to see, are they
25 completely different or is it a sliding scale of what

1 they are doing?

2 MR. McELVAIN: I think that's entirely
3 different. The IRS rule has nothing to do with any
4 of the State of Oklahoma's activities. It is just a
5 tax credit on a federal tax return that is going to
6 individual residents. It has nothing to do with the
7 State of Oklahoma.

8 THE COURT: Have I asked you about Virginia
9 versus Sebelius yet?

10 MR. McELVAIN: You have not.

11 THE COURT: I am now. The facts of that case?

12 MR. McELVAIN: Actually, it is almost identical
13 to the original complaint in this case because Virginia
14 had enacted a statute declaring their opposition to the
15 minimum coverage provision and they claimed that statute
16 as their basis for standing to sue to challenge the
17 constitutionality of that. The Fourth Circuit held that
18 is not sufficient. Again, this goes back to the
19 language of what the state's interest in it is -- is the
20 interest in creating and enforcing a legal code. So just
21 enacting a statute that is declaratory of policy does not
22 create a concrete injury that would make Virginia the
23 right party to bring that lawsuit as opposed to
24 individual persons who might have been affected by them.

25 THE COURT: How does that differ from the ATF

1 case though? Is it just a difference of opinion between
2 the Fourth Circuit and the Tenth Circuit?

3 MR. McELVAIN: No. Virginia specifically
4 discussed the ATF case and said we don't need to decide
5 whether it is rightly decided. We can assume that it is.
6 It is very different from what we have here because in
7 Wyoming, Wyoming had its own regulatory activities at
8 stake. It is the way Wyoming -- as we have already
9 discussed -- it was the way Wyoming operated its
10 expunction or expungement statute. It would have
11 operated differently depending on if -- depending on
12 whether they had won the case. So the state government
13 itself actually really had something concrete at stake
14 in the outcome of the case.

15 THE COURT: Mr. Wyrick, differentiate Virginia
16 versus Sebelius. I mean, it is pretty important to this
17 decision, isn't it?

18 MR. WYRICK: To Count 1 absolutely. And that
19 count -- you know, we understand that the NFIB Sebelius
20 case has come down. We are asking the Court to dispose
21 of that claim consistent with NFIB Sebelius. We are
22 not trying to revive the claim. You want to talk
23 about --

24 THE COURT: Under the commerce clause rather
25 than the --

1 MR. WYRICK: The taxing power rather than the
2 commerce clause, absolutely.

3 THE COURT: I am sorry, I interrupted you. Go
4 ahead with your explanation of the differentiation of
5 this case from Virginia versus Sebeblius.

6 MR. WYRICK: Factually it is pretty close,
7 but the Fourth Circuit got that case wrong and they got
8 that case wrong --

9 THE COURT: Good for you. Just go ahead and
10 say so.

11 MR. WYRICK: Well, they got it wrong because
12 they were presented with Wyoming versus United States
13 and they rejected that reasoning incorrectly based on
14 their determination that Virginia just had no interest
15 in actually enforcing that statute, that it was just
16 purely a political statement. And that was just a
17 decision that the Fourth Circuit made. Now, they
18 recognized that if Virginia had some interest in
19 actually enforcing that section of its code, Wyoming
20 versus United States was squarely on point. Now here
21 we have a constitutional amendment that prohibits
22 people in the State of Oklahoma from being subject, you
23 know, to these types of things.

24 THE COURT: Well, let me stop you there. First
25 of all, you don't ever appear in front of the Fourth

1 Circuit, do you?

2 MR. WYRICK: Thankfully, no.

3 THE COURT: Okay. Well, you won't after today.

4 MR. WYRICK: Yeah.

5 THE COURT: Getting on to the state
6 constitutional amendment, okay, it doesn't put any burden
7 on the state at all. I mean, it gives a right to the
8 citizens. It seems to be a state policy statement, just
9 like Mr. McElvain said. How can you argue that the ACA
10 prevents enforcement of that constitutional amendment
11 when there is nothing for the State to enforce? It is
12 an individual right. Who are they going to sue? I mean,
13 if that right is violated, they are going to sue, I guess,
14 the federal government, maybe. I don't know. That
15 doesn't affect Oklahoma. That question didn't make any
16 sense, did it?

17 MR. WYRICK: Well, I think the question is...
18 the Attorney General of the State of Oklahoma is the
19 chief law officer, you know, has the authority to
20 enforce all of the state's laws. And if we were
21 presented with a situation where someone was violating
22 that constitutional provision in a way that effected
23 the State of Oklahoma, we would absolutely enforce that
24 code.

25 THE COURT: Can you point me to a case that

1 says that? Because the Lujan case sounds completely
2 opposite of that. Is that what I am hearing you say,
3 Mr. McElvain?

4 MR. McELVAIN: Well, let me be sure I under-
5 stand Mr. Wyrick's point. That, that -- if his claim
6 is that the state government could enforce that
7 particular constitutional amendment, I am not sure I
8 follow that from the reading of the actual text of the
9 amendment, but assuming that and as long as we are
10 talking about purely a matter of state law, that is
11 not anything that is implicated by the minimum coverage
12 provision. The minimum coverage provision is a federal
13 tax that's not affected by the Oklahoma provision and
14 doesn't affect the Oklahoma provision.

15 THE COURT: And again --

16 MR. McELVAIN: So the --

17 THE COURT: And again -- and we will disagree
18 probably or you will disagree with the statement in my
19 question, but doesn't that go to the merits of the
20 claim? It doesn't go to standing. It goes to -- it
21 goes to whether or not Oklahoma ultimately prevails on
22 whether or not the IRS rule or its correlation with
23 the ACA affects Oklahoma's legal rights.

24 MR. McELVAIN: No.

25 THE COURT: I mean, you -- I'm sorry.

1 MR. McELVAIN: No, I'm sorry.

2 THE COURT: No, you go ahead.

3 MR. McELVAIN: No. Starting with the minimum
4 coverage provision, that's not a merits question,
5 that's a standing question because Oklahoma's burden
6 is to allege some concrete injury that it suffers from
7 the federal enactment and it just hasn't. Whatever
8 the state constitutional provision is, if it's purely
9 declaratory or if its enforcement is not affected one
10 way or the other, then there is no such injury.

11 THE COURT: But there is -- I mean, the
12 standard is just plausibility under Twombly, Twombly
13 and Iqbal?

14 MR. McELVAIN: But they haven't even alleged
15 plausibility yet since as a matter of law they lose
16 on the standing on that theory.

17 THE COURT: Okay. I guess you can call it
18 a companion case. Is it Halbig versus Sebelius?
19 Tell me about that, Mr. Wyrick. I assume you have
20 been following it.

21 MR. WYRICK: Yes, I have actually.

22 THE COURT: So have I.

23 MR. WYRICK: I have read the briefing. They
24 got a little ahead of us now in the summary judgment
25 stage. That is a case filed in the D.C. district by

1 private plaintiffs making essentially the exact same
2 claims that we make here on the merits.

3 THE COURT: Well, that's what the government
4 says you -- not what you should be doing, but what
5 should be done, right? So there is probably no issue
6 of standing in that case?

7 MR. WYRICK: Well, their view is that private
8 large employers might have standing. Well, we are a
9 large -- there is no dispute in this case that we are
10 a large employer subject to these regulations and
11 subject to this penalty.

12 THE COURT: But they don't get back to Garcia.

13 MR. WYRICK: But there is no distinction
14 between the State of Oklahoma here in its capacity as a
15 large employer and those large employers there. There
16 is just not.

17 THE COURT: Respond.

18 MR. McELVAIN: The claim that the State of
19 Oklahoma here is subject to the 4980H assessment -- as
20 we have already discussed, there is nothing pled that,
21 in fact, they are subject to it. And if you go beyond
22 the pleadings, it is very unlikely that they would be
23 subject to it.

24 THE COURT: So the -- well, could they amend?

25 MR. McELVAIN: Well, they've already amended

1 once, so it would be up to the Court.

2 THE COURT: Well, of course, I suppose. I
3 was assuming that I would allow -- I often do that on
4 motions to dismiss, is allow leave to amend. I am not
5 saying I am going to here, by the way. But couldn't
6 they cure that? It wouldn't be a futile amendment,
7 would it?

8 MR. McELVAIN: If they came back with an
9 amendment with the allegations that they presented in
10 their opposition to the Motion to Dismiss, they would
11 still lose. We would go through them -- particularly
12 if their claim is, well, we need to plan now. We don't
13 know for sure that we are going to be subject to the
14 assessment in 2014, but we now to plan now for the
15 possibility. The Supreme Court just rejected precisely
16 the same claim in Clapper, the case that I --

17 THE COURT: That's your supplemental
18 authority, right?

19 MR. McELVAIN: Correct.

20 THE COURT: Give me the facts in that case
21 because the facts weren't in the supplement.

22 MR. McELVAIN: My apologies, Your Honor.
23 The plaintiffs in that case were a group of journalists
24 and researches, I believe, who dealt with foreign
25 entities, who believed that it was possible that they

1 were subject to surveillance by the NSA --

2 THE COURT: Where in the amendment complaint
3 is the word "possibility" used?

4 MR. McELVAIN: I -- well, that's exactly the
5 problem. Oklahoma does not allege anything at all
6 about whether it is subject to the assessment. So we
7 are already at the point of where I am arguing whether
8 maybe they could amend to make their complaint look
9 more like their opposition to the Motion to Dismiss
10 and even then they will still lose.

11 THE COURT: I could have sworn that they said
12 in their amended complaint that it will definitely --
13 that it will definitely apply to them and injure them.

14 MR. McELVAIN: They say that they are --

15 THE COURT: And those are factual statements
16 or at least it is a mixed question of fact and law,
17 the fact that it will injure them, which we must take
18 as true. They didn't say it was a possibility. They
19 said it would.

20 MR. McELVAIN: They said that they are a large
21 employer. They did not allege additional facts which
22 would show that, in fact, they would incur the
23 assessment.

24 THE COURT: And an amendment would cure that?

25 MR. McELVAIN: No, it wouldn't because --

1 unless they come up with some completely new and
2 different set of facts other than what they've talked
3 about in their opposition brief.

4 THE COURT: Well, they can do that, can't they?

5 MR. McELVAIN: If we get a different complaint,
6 then I would look at the different complaint and respond
7 appropriately, but we would --

8 THE COURT: Okay. I won't ask you to
9 speculate.

10 MR. McELVAIN: But going to the opposition
11 brief -- so their claim is that -- the State of
12 Oklahoma's claim is fine, we don't know for certain
13 that we are going to be subject to this assessment,
14 we don't know what the future holds in 2014 or future
15 years, but we now to plan now for that possibility.
16 And that's what the Supreme Court rejected because
17 the same argument was presented by the plaintiffs
18 there that...sure, we don't know what is happening in
19 the future, but we have to take steps now to plan and
20 the Supreme Court squarely held -- and if you give me a
21 moment, I can find the language on this.

22 "Respondent's contention --"

23 THE COURT: Sir, give me the page.

24 MR. McELVAIN: Oh, this would be 133 Supreme
25 Court 1138 and 1151.

1 "Respondent's contention --"

2 THE COURT: I'm sorry. I am just -- I am not
3 as fast as you.

4 MR. McELVAIN: Oh, I'm sorry. I apologize.

5 THE COURT: You probably have yours highlighted,
6 don't you?

7 MR. McELVAIN: Right here.

8 THE COURT: Okay. 151?

9 MR. McELVAIN: 1151.

10 THE COURT: 1151. Okay.

11 MR. McELVAIN: "Respondent's contention that
12 they have standing because they incurred certain costs
13 as a reasonable reaction to a risk of harm is unavailing
14 because the harm Respondents seek to avoid is not
15 certainly impending."

16 So if you can't show a certainly impending future
17 injury, you can't get around that by saying, but now we
18 are incurring present costs to avoid that future
19 possibility.

20 THE COURT: Certainly impending. It is not --
21 the effects on the State of Oklahoma are not certainly
22 impending?

23 MR. McELVAIN: Correct. It is not certainly
24 impending. They are not certain to be subject to the
25 Section 4980H tax. In fact, it is very unlikely that

1 they will be.

2 THE COURT: By taking facts outside of the
3 pleading?

4 MR. McELVAIN: Correct.

5 THE COURT: Which I can't do?

6 MR. McELVAIN: If, if, if it comes down to
7 this, we could read --

8 THE COURT: Because that would be on the
9 merits if I took facts outside of the --

10 MR. McELVAIN: Well, we could represent our
11 12(B)(1) motion as a motion on the facts, if that ends
12 up being important to the Court, but the bottom line is
13 the first thing they have to do in their pleading is
14 allege that they actually will suffer an injury with
15 sufficient plausibility under the Iqbal standard and
16 they haven't alleged that. It is very -- again, going
17 back to what I said earlier, it is very, very unlikely
18 that they will incur the assessment, but they haven't
19 even begun to allege whether or not they are in the
20 complaint itself. All they have alleged is they are
21 a large employer, which they are, but they have not
22 gone further than that.

23 THE COURT: A large employer that would be
24 subject to the Act?

25 MR. McELVAIN: Would be subject to --

1 potentially subject to the assessment if they don't --

2 THE COURT: No, no, just -- let's jump back
3 even further than that. A large employer that is and
4 will be subject to the Act itself?

5 MR. McELVAIN: Correct, but that does not
6 mean that they are going to suffer any injury from the
7 operation of the Act if they are already offering
8 coverage that would qualify.

9 THE COURT: Unless they amend and make a
10 showing of that, in which case we would have this
11 hearing all over again, which I don't really want to
12 do and I am sure you all don't want to either. One
13 would rather win right now, I know.

14 Okay. So, Mr. Wyrick, you agree, you would admit,
15 that the Halbig case is really completely
16 distinguishable from this one?

17 MR. WYRICK: In terms of the state of the
18 plaintiffs? No, they are large employers just like we
19 are. I disagree with the premise of what Mr. McElvain
20 said that about our complaint. We did allege that we
21 are a large employer and --

22 THE COURT: Let's get back to Halbig. Okay?
23 I thought you said earlier that it is completely
24 different on the issue of standing than this case.

25 MR. WYRICK: I didn't say that. I said we are

1 a large employer just like they are. We are
2 indistinguishable from those private plaintiffs in
3 terms of --

4 THE COURT: Okay. So those are private
5 plaintiffs?

6 MR. WYRICK: Yes.

7 THE COURT: Okay. So it is distinguishable
8 that way.

9 MR. WYRICK: That's the distinction, but our
10 status as a large employer, there is not a difference.

11 THE COURT: Well, then, why hasn't the issue
12 of standing not arisen in that case? I mean, is it
13 because the government just decided not to challenge it?

14 Are you on that case too?

15 MR. McELVAIN: I am, Your Honor. We haven't
16 responded to the complaint yet.

17 MR. WYRICK: I believe the government has
18 indicated they are going to file a Motion to Dismiss
19 on standing grounds.

20 THE COURT: Okay. So it will be -- it will
21 be an issue. And I hate to talk about what you are
22 doing back in your office at the Department of Justice,
23 but if you are on the case, you can tell me that
24 standing is going to be -- is going to be challenged?

25 MR. McELVAIN: I hate to talk about a brief

1 that hasn't been filed yet.

2 THE COURT: I know. I will withdraw the
3 question. Never mind. That's -- that's -- I understand
4 that. Okay.

5 MR. McELVAIN: But I will offer one
6 observation, which is that there is an Anti-Injunction
7 Act problem with the large employers.

8 THE COURT: And we are getting to that.

9 MR. McELVAIN: Yes.

10 THE COURT: It is next on my list. How did
11 you know? All I have to do is turn the page and walla.

12 Okay. Mr. Wyrick, in your briefing you say, hey,
13 Oklahoma isn't seeking an injunction barring enforcement
14 of the IRS rule, 4980H.

15 Okay, let's say you say that. Isn't the effect the
16 same? I mean, if I Rule 40 you on a declaratory basis,
17 really isn't the effect the same as an injunction?

18 MR. WYRICK: One of the effects of that relief
19 will be that they can't assess that penalty against the
20 State of Oklahoma and its large employers, but that's --

21 THE COURT: Okay. So what -- go ahead, go
22 ahead.

23 MR. WYRICK: That goes to their too narrow
24 view of the injuries that we allege. You know, the
25 government's view is we can only allege injuries if we

1 are ever assessed the penalty. We have alleged these
2 other regulatory burdens that are injuries that are
3 imposed upon us and the relief we seek as to the
4 36(B) tax credit regulations are aimed at curing those
5 injuries. And, you know, if you look at the Bob Jones
6 case that they rely on, the Bob Jones University case --
7 and is the Court familiar with the facts? I mean, I can
8 give you just a brief --

9 THE COURT: Please, go ahead.

10 MR. WYRICK: In that case Bob Jones University,
11 you know, had a not for profit status. That was
12 withdrawn because of some racial policies. They weren't
13 admitting minority students. They sued seeking an
14 injunction to force the IRS to give them their status
15 back. The Court rejected that claim on anti-injunction
16 grounds or basis. Bob Jones said, well, what we are
17 asking for is just this letter that says we are not for
18 profit. We are not actually trying to enjoin the
19 collection of a tax and the Court said...well, the only
20 injuries you complain of are that you are being taxed
21 when you shouldn't be. That's the only injuries.

22 THE COURT: And what should happen in that case
23 is that the tax should be paid and then a suit filed on
24 behalf of the tax payer to get a refund?

25 MR. WYRICK: Right. They said that the Anti-

1 Injunction Act is squarely aimed at this type of case
2 because if you are being taxed right now, then the
3 federal government is receiving revenues and you are
4 asking us to give you this letter back, this status
5 back, and that's going to cut off those revenues. And
6 they made a point of noting that the only injuries
7 alleged by Bob Jones were the payment of those tax
8 penalties.

9 Now, in our case we are much closer to -- there
10 is the Seven Skies versus Holder case out of the D.C.
11 circuit, an individual mandate case. It is not really
12 relevant on those grounds, but they looked at the
13 Anti-Injunction Act issue as it relates to the individual
14 mandate and they did, I think, a really good job of
15 distinguishing that case from Bob Jones where they said
16 what we have here is relief that seeks to enjoin this
17 regulatory regime. Now, one of the consequences of
18 the relief that we are going to grant is that it is
19 going to prevent the government from taxing people or
20 penalizing them or whatever you want to call it if
21 they fail to comply the regulatory regime, but the
22 relief that the Plaintiffs are seeking is to be
23 relieved of all of these regulatory burdens. That's
24 the relief they are seeking. So this is a different
25 type of case and not the type of case that the

1 Anti-Injunction Act applies to in its terms. That's,
2 you know, notwithstanding the question of whether we
3 even have a tax here, but just whether the
4 Anti-Injunction Act is even aimed at this type of a case.

5 THE COURT: Okay. I'll ask you both this.
6 Who should go first? Mr. Wyrick, you should go first.
7 Is the AIA, the Anti-Injunction Act -- is it
8 jurisdictional or not? I know there seems to be a
9 disagreement -- well, of course there is a disagreement
10 among the parties. Why is it jurisdictional? I mean,
11 the case is cited by -- the government seemed to
12 indicate it is pretty jurisdictional. I don't know
13 if there is a degree of jurisdictional, but it seems
14 pretty high up there.

15 MR. WYRICK: The courts have used that
16 language and this was hotly contested in the NFIB
17 versus Sebelius case. The parties filed, you know,
18 50 page briefs on this issue. It was argued before
19 the Supreme Court as to whether it was jurisdictional
20 and the Supreme Court, like it has done in other
21 cases, avoided that difficult question because they
22 said...well, the Anti-Injunction Act doesn't apply.

23 THE COURT: Can I do that here? Can I avoid
24 it?

25 MR. WYRICK: Well, we don't think the

1 Anti-Injunction Act applies, so, yeah, you could avoid
2 that. We raised that as an issue because if you agree
3 with the government that it applies -- this isn't a
4 jurisdictional statute. Here is why: One, they
5 recognize in their briefing that there is a judicially
6 created exception. Right? The South Carolina --

7 THE COURT: But is that the exception that
8 you say isn't applicable here? Mr. McElvain, didn't
9 you not really say what it --

10 MR. McELVAIN: It does not apply here.

11 THE COURT: Okay. But you didn't tell me
12 what it was?

13 MR. McELVAIN: I hope I did. If I didn't --
14 actually, the Williams Packing exception may have been
15 discussed in our brief. That is an exception that has
16 been described as an exception if the government in no
17 conceivable circumstances can prove the validity of
18 its claim or succeed as a defendant and equity
19 jurisdiction otherwise exists. It is a very, very,
20 very narrow exception that is not met here.

21 THE COURT: I remember you talking about
22 the equity exception.

23 MR. McELVAIN: Yes.

24 THE COURT: Just your statement on Page 17,
25 "The AIA provides that, with statutory exceptions

1 inapplicable here, 'no suit for the purpose of restraining
2 the assessment or collection of any tax,' " blah, blah, blah.

3 MR. McELVAIN: There are exceptions that have
4 to do with partnership adjustments, challenges to
5 levies. There is a whole list of individual things
6 in the code, but none of those are relevant in this
7 case.

8 THE COURT: Mr. Wyrick, do you agree those
9 statutory exceptions are -- and they sound like they
10 are not really applicable here?

11 MR. WYRICK: No, and they don't. The relevant
12 exception that we are talking about is the judicially
13 created exception. He is right, it is from the
14 Williams Packing case. It is Blackletter law. Courts
15 can't create exceptions to jurisdictional statutes,
16 right? If it is a truly jurisdictional statute,
17 you can't create an exception to it. That's the first
18 indication that what we have in the Anti-Injunction
19 Act is not jurisdictional.

20 Secondly, in the United States Code in Title 28,
21 we have all of the jurisdictional statutes, right,
22 1332, 1331? That's where the Tax Injunction Act,
23 the Act that says a federal district court can enjoin
24 the collection of a state tax is found. They put the
25 Anti-Injunction Act in a separate section. They

1 didn't put it in the jurisdictional section of the
2 United States Code. And secondly, I mean, if you just
3 look at the Tax Injunction Act, the difference is
4 that Act is aimed at courts, right? It says, "A court
5 can't enter this relief." Whereas, the Anti-Injunction
6 Act is aimed at the litigants. It says no --

7 THE COURT: Does it apply to states?

8 MR. WYRICK: The Tax Injunction Act -- oh,
9 does it apply to states? Well, the long-standing
10 presumption has always been that when a statute says
11 person that doesn't include the sovereign.

12 THE COURT: Mr. McElvain?

13 MR. McELVAIN: We haven't briefed that point
14 because it wasn't an argument raised by the plaintiffs.
15 They just mentioned in a footnote that that might be
16 an issue. So if this is an issue --

17 THE COURT: But you had the reply, I mean,
18 you had the last word --

19 MR. McELVAIN: But they didn't actually raise
20 the argument. They just said...well, there might be a
21 question about this.

22 THE COURT: Okay.

23 MR. McELVAIN: But I would be happy to address
24 the response right now.

25 THE COURT: Please do.

1 MR. McELVAIN: Which is the history of the
2 Anti-Injunction Act from the 1860s, when it was first
3 enacted, up to 1967, I believe, which is one of the most
4 recent amendments, simply said no suit for the purpose
5 of restraining the assessment or collection of taxes
6 shall be maintained. Then there was an issue of...
7 well, is it appropriate if somebody is not even a
8 taxpayer who has had their property levied on, should
9 they be foreclosed from going to federal court? So
10 Congress established a procedure to do that and then
11 they added language saying -- to the original language
12 saying by any person except for, you know, other things
13 like the levies. So the "by any person" language that
14 Mr. Wyrick refers to was in addition to the regular
15 language, which the Supreme Court in Bob Jones and
16 Americans United recognized was simply declaratory,
17 didn't change the meaning of the statute. So the
18 notion that a State is not usually construed to be a
19 person within the meaning of the federal statute does
20 apply for some purposes, but there is no reason to
21 apply that in a case which talks about who or who is
22 not authorized to sue the federal the government
23 because the State has no special sovereignty interest
24 in suing when other parties could not. So, in fact,
25 the AIA has been applied in a number of cases where

1 states were suing over their own employment taxes --

2 THE COURT: Let me --

3 MR. McELVAIN: -- that they paid on their
4 employees.

5 THE COURT: Let me -- I'm sorry to interrupt.
6 Let me go back to a phrase that you just used. Well,
7 of course, now I can't remember it. States have no
8 inherent right to --

9 MR. McELVAIN: There is no special sovereignty
10 interest that would require them to be treated as not
11 a person for the purpose of this statute because it is
12 just talking about who gets into federal court, not how
13 the state is getting regulated.

14 THE COURT: And in talking about who gets into
15 federal court, then I am supposed to give that
16 special solicitude we talked about in the beginning,
17 right?

18 MR. McELVAIN: No. There are repeated
19 Supreme Court cases where tax statutes have been
20 applied to the states on equal terms as private
21 litigants. So, again, it is a complicated issue and
22 Mr. Wyrick is right that it was briefed extensively
23 before the Supreme Court. The Supreme Court didn't
24 need to reach the issue. If it is something the Court
25 is concerned about, I would be happy to offer

1 supplemental briefs, but all we had up to this point
2 was a footnote noting that there might be a question
3 at some point.

4 (PAUSE)

5 And if I could return to the prior question --

6 THE COURT: I am never -- you know, I take a
7 little time to think --

8 MR. McELVAIN: I am sorry, Your Honor.
9 I apologize, I apologize.

10 THE COURT: And you want to fill it with
11 argument, which is good. I will just not take as much
12 time.

13 One of the standards, one of the exceptions,
14 I think, to the AIA as far as standing goes is whether
15 someone is an aggrieved party without any other
16 recourse. Are you familiar with that?

17 MR. McELVAIN: That's the South Carolina
18 versus Regan issue, which Mr. Wyrick mentioned.

19 THE COURT: Okay. Couldn't Oklahoma be
20 considered that? I mean, you are saying -- you are
21 saying they don't have any recourse at all.

22 MR. McELVAIN: Their claim is that they are
23 going to be improperly -- well, if their claim is that
24 they are going to be improperly assessed a Section 4980H
25 tax, the remedy is to go into a tax refund suit and

1 bring your claim then. That's the whole purpose of
2 the Anti-Injunction Act, is that Congress set up this
3 procedure that after an assessment these issues can be
4 sort out.

5 THE COURT: Do you ever -- has the Department
6 ever been involved in a case where a state was being
7 taxed and paid the tax and sued for a refund?

8 MR. McELVAIN: I'm sure that it has happened.
9 I know that there are a number of cases where states
10 have tried to get around the AIA by claiming that their
11 states -- and Court of Appeals have held that states are
12 subject to the AIA and they have to go to a refund
13 action.

14 MR. McELVAIN: It arises --

15 THE COURT: So the Court --

16 MR. McELVAIN: It arises -- I'm sorry. I mean,
17 obviously states aren't subject to income taxes, so it
18 arises in the employment tax context.

19 THE COURT: Okay. So is there any reported
20 case on that?

21 MR. McELVAIN: There are. I did not --

22 THE COURT: That's okay.

23 MR. McELVAIN: I have no citations off the top
24 of my head, but there are --

25 THE COURT: Like you said, this wasn't

1 completely briefed and --

2 MR. McELVAIN: There is a California versus
3 United States case out of the Ninth Circuit, but I
4 guess -- California versus United States and I am
5 guessing it was in the 1970s, but I, I -- that's a
6 guess. I don't know the citation off the top of my head.

7 THE COURT: Okay. Thank you. Are you aware,
8 Mr. Wyrick

9 MR. WYRICK: I am not aware of. I haven't
10 looked those up.

11 THE COURT: Fair enough, fair enough.

12 Okay, Mr. Wyrick. Oklahoma takes the position
13 that the AIA doesn't apply here because it wouldn't
14 be enjoining the collection of a tax because the net
15 effect of the ACA is to -- it reduces tax collection,
16 doesn't increase it. Okay? Is that your argument?

17 MR. WYRICK: That's one of our arguments, yes.

18 THE COURT: Okay. And you say the government
19 admitted that or admitted that it would collect less
20 than it pays out?

21 MR. WYRICK: The government's own agencies
22 and estimates say that is true.

23 THE COURT: Is that in their brief?

24 MR. WYRICK: Yes, but we cite to the
25 Congressional Budget Office's analysis of the Act that

1 concludes that in the first year this will cost the
2 federal government 12 billion dollars.

3 THE COURT: Again, outside the pleadings,
4 something I really shouldn't consider?

5 MR. WYRICK: Well, no, I think it -- because
6 this is relevant to the law, whether the AIA applies as
7 a matter of law --

8 THE COURT: I don't know if that's an
9 exception to going outside the pleadings on a motion
10 to dismiss, but...Mr. McElvain?

11 MR. McELVAIN: We won't dispute that. It
12 certainly is the case that far more tax credits will
13 be flowing to Oklahoma individuals than there will be
14 taxes collected from Oklahoma employers. That, I think,
15 is well-established.

16 THE COURT: Okay.

17 MR. McELVAIN: It doesn't matter at the end of
18 the day though. There is exact language on -- well, not
19 exactly, but on this general argument there is language
20 on this from the Tenth Circuit in Hill versus Kemp,
21 where they said you are challenging a tax and you,
22 the plaintiff, are arguing...well, at the end of the day
23 when everything shakes out from the relief you are
24 seeking --

25 THE COURT: It is not really a collection?

1 MR. McELVAIN: I'm sorry?

2 THE COURT: When everything shakes out at the
3 end of the day, it is not really a collection issue.

4 MR. McELVAIN: The plaintiffs there were
5 saying...well, at the end of the day, let's see what
6 actually -- if you get more revenues from the -- than
7 the relief we are seeking, and the Tenth Circuit said we
8 are not going to parse it that way. If you are
9 challenging a tax and you are challenging the revenue
10 of a particular tax, we are not going to go beyond
11 that to look at what anybody's theories are about what
12 the overall effects are.

13 THE COURT: Isn't that true, Mr. Wyrick?
14 I mean, I would really hate to sit up here back in
15 chambers and do the accounting necessary to determine
16 which way it goes, whether it collects more or
17 disperses more. I mean, you don't want me to do that,
18 do you?

19 MR. WYRICK: And the Court doesn't have to
20 and that's the distinction between this and the Hill
21 versus Kemp case. And if I could just take a moment
22 on that case because I think the facts are --

23 THE COURT: He brought it up, so, yeah, go
24 ahead.

25 MR. WYRICK: In the Hill versus -- I am

1 familiar with it because it involved Oklahoma license
2 plates, right? It was one of our cases. The
3 Plaintiffs in that case did argue for purposes of the
4 Anti-Injunction Act -- they speculated, as the Court
5 said, that this might end up being sort of a negative
6 revenue regulation for the state. The Court pointed
7 out two things. The Court said...well, for purposes
8 of standing and mootness, you just told us that this
9 is actually going to cost you money and this is
10 actually going to be a revenue positive tax for you.
11 So they said, you know, at best you are speculating and
12 they said you are asking us to put on our economist hat
13 and figure out whether that is actually true or not.
14 You don't have that problem here because the federal
15 government's own agencies, their own estimates of
16 even -- you know, he is admitting at the podium this
17 is going to be a cost -- this is a spending bill for
18 the federal government, not a revenue raising measure.

19 THE COURT: And that's the case you would
20 rely upon for that argument?

21 MR. McELVAIN: I'm sorry, Your Honor, who are
22 you --

23 THE COURT: No, I am sorry, Mr. McElvain.

24 Mr. Wyrick, that's the case that you --

25 MR. WYRICK: That's the only case they have

1 cited in response to our argument --

2 THE COURT: Is there another one?

3 MR. WYRICK: Well, there is Hibbs versus Winn
4 and if you read the Kemp versus Hill or the Curry versus
5 Hill case, the Court goes into an analysis of Hibbs
6 versus Winn and it was a Supreme Court case. That was
7 a Tax Injunction Act case, but the issue was someone was
8 challenging state tax credits and the Court in that case
9 went through the explanation and the Tenth Circuit
10 walked through that analysis as well, that what we are
11 talking about is a tax credit and that that doesn't fit
12 within the purposes of the Tax Injunction Act. The
13 Tax Injunction Act is about protecting the federal
14 government's stream of revenue. What we have is an
15 Act of Congress that actually does the opposite. The
16 purposes of the Act just aren't furthered by
17 applying the Anti-Injunction Act. That's exactly
18 what we have here.

19 THE COURT: Mr. McElvain, why didn't the AIA
20 bar or affect standing in the NFIB case? Was it an issue?

21 MR. McELVAIN: It was an issue. There was a
22 circuit split because the Fourth Circuit had reached
23 the conclusion that it did apply. So the Supreme Court
24 needed to address it and the issue in -- if you look at
25 the actual language of Section 500(a), it did not use

1 the actual word tax, it used the word penalty. That
2 didn't matter for constitutional purposes because the
3 wording doesn't matter for the constitutional power,
4 but the wording actually was dispositive for purposes
5 of the AIA because that is a creature of Congress's
6 creation. The AIA applies to taxes. Section 5000(a)
7 did not use that word, so the AIA did not apply.
8 Section 4980H is very different because it does
9 actually refer to the assessment as a tax. So under
10 the reasoning of NFIB, Section 4980H is subject to the
11 Anti-Injunction Act.

12 THE COURT: Okay. I would note for the record
13 that Mr. Wyrick is cheating and getting water from
14 people in the gallery; whereas, you are not getting any
15 at all. Would you like some water?

16 MR. McELVAIN: I would, Your Honor. Thank you.

17 MR. WYRICK: That's the advantage of the back
18 podium.

19 THE COURT: It is. I didn't realize that,
20 but I will remember that for the future and put both
21 podiums up here. No problem.

22 (PAUSE)

23 THE COURT: Mr. Wyrick, did you have anything
24 you wanted to respond to on the NFIB case, the standing
25 issue?

1 MR. WYRICK: On the Anti-Injunction Act issue?

2 THE COURT: Yes. I am sorry, the Anti-
3 Injunction Act issue.

4 MR. WYRICK: I absolutely do because, if you
5 recall, in that case the government argued that the
6 Anti-Injunction Act didn't apply to the individual
7 mandate and they offered a whole range of reasons why
8 that was so, most of which are squarely on point with
9 the large employer mandate. You know, they pointed out
10 that when Congress wants the Anti-Injunction Act to
11 apply, they know how to do it. One example that they
12 gave is Section 9010 of the Affordable Care Act, which
13 is found in Title 9, the revenue raising provisions.
14 In that -- it's an excise tax on health insurance plans
15 and Congress actually said your remedy is a refund
16 action if you have a problem with paying this tax.
17 The government in that case argued that, well, here --
18 one, Congress didn't put this in Title IX of the Act
19 with the revenue raising provisions, they it up in
20 Title I. And secondly, that just shows how Congress,
21 even within this Act, knew how to say we want the
22 Anti-Injunction Act to apply and they did neither.
23 Those points apply with equal force to the large
24 employer mandate.

25 Another argument that the federal government made

1 was that Congress with, you know, Subchapter B or
2 Subpart B of Chapter 68 of the Internal Revenue Code
3 went in and said everything within this --

4 THE COURT: I'm sorry, I'm sorry, go back.

5 Give me the citation again. Subchapter B...

6 MR. WYRICK: I think it's Subchapter B of --
7 Subpart B of Chapter 68. It's a long Internal Revenue
8 Code, Your Honor.

9 But, yeah, that provision Congress went in and said
10 for purposes -- we want to treat everything within that
11 section, whether we call it a penalty, an assessment,
12 a tax or whatever, as a tax and that means the Anti-
13 Injunction Act applies to all of it.

14 THE COURT: Is it -- go ahead.

15 MR. WYRICK: And the federal government said
16 the individual mandate wasn't put in Chapter 68,
17 therefore, that shows that Congress didn't intend for
18 it to be treated as a tax even though they call it
19 something else. Same thing is true for the large
20 employer mandate. They didn't put it in Chapter 68.
21 Now, the only thing they have is this idea that the
22 NFIB court, you know, placed some significance on the
23 fact that Congress didn't use the word tax. They say
24 there is like talismanic significance to the fact that
25 here --

1 THE COURT: Say that again. Talismanic?

2 MR. WYRICK: Talismanic significance, that
3 that is all you have to care about, is that use of the
4 word tax and you can forget about everything else.
5 Well, you read 4980H and I think it is almost a dozen
6 times they call it an assessable payment. They call
7 it a penalty in one place. They do use the word tax
8 once in referring back to the Subpart B assessment
9 and then later when talking about the deductibility
10 they refer back and use the word tax, but the
11 government says place all of the significance on the
12 word that Congress used. Well, you have to place
13 significance on the fact that they use the word penalty.
14 They use the word assessable payment throughout. If
15 you read the regulations that the federal government
16 has promulgated, they call it an assessable payment
17 and a penalty. They don't call it a tax.

18 Now, it is far from clear that Congress intended
19 the Anti-Injunction Act to apply and just that one use
20 of the word tax doesn't indicate -- particularly with
21 everything else we have talked about in context, but,
22 you know, the bigger point is, I think, is it is not
23 a tax. If you just look at it, it is not for the
24 purposes of raising revenue and that is sort of the
25 bellwether indicator that the Supreme Court has said

1 of whether something is a tax. In fact, if it works,
2 no money goes to the federal government. Its purpose
3 is to direct money to insurance companies, not to the
4 federal coffers. Second, it is punitive. Taxes can't
5 be punitive. You know, there is the Drexel Furniture
6 case, the child labor case that we talked about. The
7 4980H(a), that's the one where you get hit with the
8 penalty for every employee, that's punitive. It has
9 no correlation to the amount of money that the federal
10 government is paying out. As an employer, you get hit
11 for every employee. And, you know -- so for purposes
12 -- I mean, I think just as a starting point if you are
13 looking at whether it is a tax, no, it is not a tax.
14 Did Congress intend to treat it as tax nonetheless?
15 If you look at it within the context of the Affordable
16 Care Act as a whole, hardly so.

17 THE COURT: All right. Just a moment.

18 MR. McELVAIN: May I respond to that, sir?

19 (PAUSE)

20 THE COURT: Before I forget, I will let you
21 proceed. Mr. Wyrick, the court reporter has complained
22 to me about this too, but you talk fast. Okay? So, so
23 -- are you a native Oklahoman?

24 MR. WYRICK: I'm actually an Atoka native,
25 believe or not. You would never guess, but...

1 THE COURT: Because we are supposed to talk
2 slow, but we both talk fast.

3 MR. WYRICK: I know, I'm sorry.

4 THE COURT: She is having a little trouble
5 getting down everything you say, so if you can try to
6 slow it down that would be helpful.

7 Okay. Now, do you remember what your response was
8 going to be?

9 MR. McELVAIN: I do.

10 THE COURT: Okay.

11 MR. McELVAIN: I do. That's usually my
12 problem, Your Honor, so I am feeling lucky, but I am
13 not making any promises for the rest of the argument.

14 THE COURT: Okay.

15 MR. McELVAIN: As to the notion that because
16 Congress had a regulatory purposes in enacting a large
17 employer tax, that that takes it out of the AIA, the
18 Supreme Court expressly rejected that notion in the
19 Bob Jones University case. They went through the prior
20 case law fairly extensively in Bob Jones saying there
21 were times in the past where we looked to whether a
22 tax was more regulatory or more revenue raising. We
23 don't do that anymore. If it's a tax that raises
24 revenue, it is subject to the AIA, no matter if
25 Congress also had a regulatory reason in enacting the

1 tax and --

2 THE COURT: We don't do that anymore,
3 meaning...

4 MR. McELVAIN: We, the Supreme Court, do not
5 do that anymore. If it is a tax, it is subject to the
6 AIA --

7 THE COURT: Based upon the Bob Jones case?

8 MR. McELVAIN: Bob Jones, yes.

9 THE COURT: Okay, okay. Let's move on --
10 let's go to the Garcia issue.

11 Mr. McElvain -- well, no. Mr. Wyrick, why don't
12 you give us the facts, the reasoning and the result of
13 the Garcia case, which is one, I guess, you sort of want
14 me to ignore. So you get to do that --

15 MR. WYRICK: Well, that case involved whether
16 the National Labor Standards Act -- I think it is
17 minimum wage standards in particular involved in that
18 case -- could be applied to a political subdivision of
19 a state, such as the San Antonio Metro Transit Authority
20 or whatever authority it was. So the Court was
21 confronted with the issue of whether -- you know, it had
22 to overrule, you know, its previous case law where the
23 Court had engaged in the activity of saying we can't
24 impose these types of things on states when they go to,
25 like, core government functions. In that case the

1 Supreme Court finally said we think that's too
2 difficult, that test has become too complicated to
3 apply, so we are just going to say that under the
4 Commerce Clause we are going to allow the National
5 Fair Labor Standards Act to apply to states.

6 Our argument is that that case remains -- has not
7 been overruled. We recognize that. We don't dispute
8 that. We do think it has been called into question.
9 I mean, you look at --

10 THE COURT: Let me stop you a minute.

11 Mr. McElvain, was the result of that case based upon
12 the standing?

13 MR. McELVAIN: No, that's --

14 THE COURT: That's a substantive case, right?

15 MR. McELVAIN: That's a merits issue and we
16 haven't gotten to the issue of whether Oklahoma is right
17 or not on the merits, that there is any reason to doubt
18 the continued vitality of that holding. They don't
19 get over the standing threshold because they haven't
20 alleged any injury to them that could trigger any
21 asserted Tenth Amendment right that would require
22 overruling Garcia.

23 THE COURT: Which you understand that I am
24 somewhat hesitant to overrule a Supreme Court case,
25 don't you, Mr. Wyrick?

1 MR. WYRICK: I do, Your Honor.

2 THE COURT: How would I do that? I mean, you
3 know, what procedural avenue would this Court take to
4 rule that Garcia isn't applicable? I mean, it would
5 seem -- it would seem a little too harsh or colloquial
6 to say, hey, Supreme Court, I read Garcia and my
7 interpretation is better than yours.

8 MR. WYRICK: I think that the one thing --

9 THE COURT: How am I supposed to do it?
10 I mean, do I say I won't do it and let the Circuit or
11 the Supreme Court do it? I mean, you are not really
12 expecting me to do it, are you?

13 MR. WYRICK: We understand that's a difficult
14 position for a district judge. What we are trying to
15 do is --

16 THE COURT: Thank you.

17 MR. WYRICK: We think we have, you know, the
18 right to at least have it heard by the Court, but it is
19 important to note here and the Court in NFIB versus
20 Sebelius talked about it ad nauseam that that was a
21 completely unprecedented type of legislation by the
22 Congress. Nothing like this had ever been seen before.
23 And I think if you think about it terms of now, in terms
24 of the Commerce Clause, whether we can take that type
25 of unprecedented legislation -- and it is like nothing

1 we have ever seen before -- and apply it to the states.
2 There is at least a good argument there that that
3 crosses the line, that Garcia does not stand for the
4 proposition that they can do whatever they please to
5 the states in that regard or under the Commerce Clause
6 or otherwise.

7 THE COURT: And Garcia, at least on the
8 merits, really goes to which of your claims?

9 MR. WYRICK: Are you asking me?

10 THE COURT: Yes. I am sorry.

11 MR. WYRICK: Oh, that's Count 4, I believe.

12 THE COURT: So really the only way -- the only
13 way you can win on Count 4 is if this case goes all of
14 the way to the Supreme Court and they say you can?

15 THE COURT: Ultimately, unless this Court
16 does find a factual distinction, which we understand --
17 between the case and Garcia or outright -- you can't
18 overrule Garcia, but --

19 THE COURT: Thank you. No, I am -- and I am
20 not -- I am just kidding you. I am just saying that
21 would feel difficult. Okay.

22 (PAUSE)

23 THE COURT: Sorry, I have to go through all of
24 my little tabs.

25 (PAUSE)

1 THE COURT: Mr. McElvain, is this really an
2 abstract question that the State of Oklahoma has
3 presented?

4 MR. McELVAIN: Absolutely. They are simply
5 claiming that they prefer one policy and the federal
6 government has chosen a different policy. The Supreme
7 Court has held over and over and over that those kind
8 of policy disputes are not a concrete injury or a
9 concrete dispute between the state and the federal
10 government, even though it might lead to a concrete
11 dispute between a private party and the federal
12 government. United States versus West Virginia,
13 New Jersey versus Sargant, Texas versus ICC, all of
14 which are cited in our briefs, are cases over and over
15 and over again where the Supreme Court has said just
16 a mere conflict between state and federal statutes
17 that don't actually implicate any enforcement or
18 regulatory activities of the state -- the mere fact
19 that they have different policies by itself is not --
20 does not state a concrete controversy.

21 THE COURT: Okay. Back with regard to the
22 AIA, you cite Enochs versus Williams Packing. Did the
23 AIA bar suit in that case?

24 MR. McELVAIN: It did. That's my
25 understanding.

1 THE COURT: Are you sure? I mean, I --

2 MR. McELVAIN: I would have to go back and
3 read the case, but they -- that's the case that
4 announced that the standard is very, very narrow and
5 my memory is that the Supreme Court said that that
6 standard was not met.

7 THE COURT: Well, because in the sentence
8 you quoted from it says"...because of the
9 Anti-Injunction Act, taxes can ordinarily" -- and
10 that's my emphasis -- "ordinarily be challenged only
11 after they are paid by suing for a refund." That seems
12 to beg the idea that sometimes they can be challenged
13 otherwise.

14 MR. McELVAIN: There are some -- for income
15 taxes, an individual taxpayer can go to tax court and
16 that would be challenging what is called the notice
17 of deficiency, which is where the IRS says here is
18 what we think your taxes are that are owed, but we
19 haven't actually formally assessed that amount yet
20 or tried to collect it yet. So there are statutory
21 exceptions in the code before the actual formal
22 moment of assessment arises. As I mentioned before,
23 there are levying proceedings and partnership
24 adjustments, but --

25 THE COURT: That's right.

1 MR. McELVAIN: -- but nothing that is
2 implicated here.

3 THE COURT: Okay.

4 (PAUSE)

5 THE COURT: We are getting close. I will give
6 you a chance to wind up.

7 (PAUSE)

8 THE COURT: Okay. Mr. -- well, do you want to
9 say something, Mr. Wyrick?

10 MR. WYRICK: Your South Carolina versus Regan
11 point from before about whether the state has the
12 opportunity to see a refund, again the government is
13 ignoring the injuries we actually allege, which is a
14 regulatory one, but also I am aware of no action for a
15 refund of our sovereign choice that was deprived of us
16 by this IRS rule. And the government has described no
17 circumstance -- they can't tell us how we would ever
18 be able to get that redressed if not in this type of
19 lawsuit, but they ask the Court under the Anti-Injunction
20 Act to bar the suit in its entirety and that's just
21 wrong.

22 THE COURT: Okay. Anything just to wind this
23 up that you would like to leave the Court with? We
24 have been going almost two hours and all of my tabs,
25 yellow and red, and my pages of notes have been

1 covered.

2 SO, Mr. Wyrick, it is the State of Oklahoma's
3 motion. Anything you would like to wind up with?

4 MR. WYRICK: It is actually the government's
5 motion.

6 THE COURT: I am sorry. It is your suit.
7 I am sorry. Mr. McElvain, go ahead.

8 MR. McELVAIN: You know, I think we have
9 covered all of the ground that I wanted to cover.
10 There is just one further --

11 THE COURT: Did I cover it more than you
12 wanted to?

13 MR. McELVAIN: Perhaps, perhaps, but one
14 further point that I would also like to offer, which
15 is there is a particular reason here to be
16 particularly skeptical of a state's claim of
17 standing. One of the points that the Virginia versus
18 Sebelius court made is that the rule against parens
19 patriae standing by a state against the federal
20 government serves a number of purposes, but one
21 important purpose is to insure the state's litigation
22 -- that we avoid cases where the state's litigation --

23 THE COURT: Slow down just a little, slow
24 down.

25 MR. McELVAIN: I warned you, I warned you.

1 THE COURT: All right.

2 MR. McELVAIN: -- to avoid cases where the
3 state's litigation approach might well diverge from
4 that of an individual to whom the challenge provision
5 does apply. There is very, very good reason to take
6 that language to heart here because there is an
7 estimated 380,000 Oklahomans who stand to benefit
8 from these tax credits --

9 THE COURT: Okay, now you are getting to
10 whether it is a good law or a bad law.

11 MR. McELVAIN: Well, it is not whether it is
12 a good law or a bad law, it is just that there are
13 those hundreds of thousands of people who have an
14 interest that may diverge from the state. Maybe at
15 the end of the day --

16 THE COURT: No, that's on the merits though.
17 I mean, that's --

18 MR. McELVAIN: No, the -- I am sorry.
19 I didn't mean to interrupt you, but --

20 THE COURT: Go ahead.

21 MR. McELVAIN: But they do have that interest
22 under the IRS rule that Oklahoma is now seeking to
23 extinguish. That's not a merits question.

24 THE COURT: Where do you come up with
25 380,000?

1 MR. McELVAIN: That was the estimate from
2 the Families USA Publication, which we cited in our
3 brief.

4 THE COURT: But which aren't included in the
5 complaint?

6 MR. McELVAIN: No, but I don't think there
7 would be any dispute that there are many, many
8 Oklahoma residents that would --

9 THE COURT: Well, you still -- you don't think
10 there would be, but by the time we get to -- on the
11 merits there may be, but, I mean -- because that is
12 outside the -- that statement you just made is outside
13 the complaint and I am supposed to look at what is in
14 the complaint.

15 MR. McELVAIN: You know, the Court does not
16 need to decide exactly what the number is or how much
17 they would benefit from --

18 THE COURT: No, but my problem, Mr. McElvain,
19 is I said at the very beginning of this hearing I don't
20 want to hear about whether it is a good or bad law and
21 when you throw out figures like 380,000, that's --
22 that's getting close to doing that.

23 MR. McELVAIN: My point is not whether it is
24 a good or bad law. It is just that there are a lot of
25 people who have their own interest that very likely

1 would diverge from what the State of Oklahoma's
2 asserted interested is.

3 THE COURT: I will accept a lot. That's
4 pretty generous. I mean, that's broad and doesn't
5 get into actual figures that I would decide on the
6 merits. I accept that. And I interrupted you again.
7 I am sorry, sir. Is there anything else you would like
8 to say?

9 MR. McELVAIN: No, that's just the point,
10 that there is a particular reason to be particularly
11 skeptical of the State's attempt to litigate private
12 citizens rights or responsibilities here where those
13 private citizens could be pursuing their own lawsuit
14 if they have an interest that they seek to vindicate.

15 THE COURT: Despite the special solicitude
16 element of looking at standing?

17 MR. McELVAIN: Because that does not erase
18 the concrete injury requirement.

19 THE COURT: Okay, all right. Mr. Wyrick,
20 winding up...

21 MR. WYRICK: Your Honor can ignore the
22 parens patriae red herring because that's what it is.
23 We have alleged injuries to the State of Oklahoma
24 itself. That first injury that we talked about, the
25 sovereign injury, the deprivation of the choice that

1 Congress gave us, as best I can tell, the government's
2 only response is that they are right on the merits.
3 They haven't explained how that is not an injury to
4 the state. And as to the injuries that we have
5 alleged about the regulatory burdens that are now
6 imposed on us -- and we did plead those in the
7 complaint. We said we are large employer subject to
8 these. And when they said that is implausible, we
9 expanded on that and gave some concrete examples in
10 the briefing and those concrete examples show that
11 you can be injured by a regulation even if at the
12 end of the day you are never penalized.

13 The federal government's view of this things is
14 they can point the regulatory gun at you and order
15 you around, but so long as they don't pull the trigger
16 you are never injured. Right?

17 THE COURT: Now, that's a little bit of
18 hyperbole. let's go back and say that as -- let's go
19 back and say that without the hyperbole.

20 MR. WYRICK: They can impose these regulations
21 on us, these 144 pages of regulations that we have to
22 wade through and figure out how to comply and figure
23 out where our health plan might diverge from what they
24 tell us we have to do in order to avoid the guarantee
25 that we will be penalized on January 1 if we don't

1 comply. And their view is you are not injured at all
2 unless we actually penalize you after January 1. And
3 that's a far too narrow view of what they have done
4 to the State of Oklahoma by imposing this obligation
5 on us when Congress wrote a statute that says they can.
6 That's why the motion should be dismissed or denied.

7 THE COURT: Okay. I thank you for your
8 argument. You guys are really good. You have given
9 me a lot -- I had a lot to think about before and you
10 come in here and you answer my questions and I find
11 out...well, I have more to think about. You might
12 think that, well, my argument should be persuasive
13 and it should be easy for him, but that's not the way
14 it usually works. Like I said, excellent performance
15 as advocates.

16 I hope to get an opinion or order out soon.

17 Did you fly in last night, Mr. McElvain?

18 MR. McELVAIN: I did, Your Honor.

19 THE COURT: Stay in Tulsa?

20 MR. McELVAIN: I stayed in Tulsa, I did.

21 THE COURT: Muskogee is a nice place to stay
22 too, if you like.

23 MR. McELVAIN: I like Muskogee too.

24 THE COURT: Are you leaving today or are you --

25 MR. McELVAIN: I am flying back tonight.

1 THE COURT: Okay. You could put your feet up
2 and stay awhile.

3 MR. McELVAIN: I am sorry?

4 THE COURT: You could put your feet up and
5 stay awhile, if you want.

6 MR. McELVAIN: That would be very nice.

7 THE COURT: We are glad to have guests here.
8 I guess everyone is a guest here, but it was good to
9 see all of you.

10 Mr. Pruitt, thank you very much for coming. It
11 was good to see you.

12 All right. Ladies and gentlemen, thank you very
13 much.

14 (END OF PROCEEDINGS)

15

16 "I certify that the foregoing is a correct transcript
17 from the record of proceedings in the above-entitled
18 matter."

19 S/Karla S. McWhorter

20

21 KARLA S. McWHORTER

22

23 July 31, 2013

24

25 DATE